Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

BRIAN BENNETT and
MICHAEL HARRIS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

**Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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109 pp

QUESTIONS PRESENTED

Whether the opinion of the Ninth Circuit in this case properly construed the law of this Court regarding the applicability of the Fourth Amendment of the United States Constitution to United States citizens travelling outside the jurisdiction of the United States Government and the right to be free from unreasonable searches and seizures conducted by United States Government officials in conjunction with foreign law enforcement officers?

Whether the opinion of the Ninth Circuit in this case works as a violation of equal protection of laws under the Fifth Amendment to the United States Constitution? The decision of the Ninth Circuit apparently places judicial approval on Government law enforcement's ability to conduct virtually uncontrolled, monitored or approved investigations as to persons involved in non-national security matters. This ability does not exist where Congressional and Presidential authority stringently restricts identical investigations as to persons involved in matters directly related to national security.

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Brian Bennett and Michael Harris respectfully petition for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals for the United States.

OPINION BELOW

The opinion of the Ninth Circuit (App., *infra,* 1a - 49a) is unreported.

STATEMENT OF JURISDICTION

The Ninth Circuit delivered its opinion on June 5, 1995. A rehearing en banc was denied on June 18, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

The Fifth Amendment to the Constitution of the United States provides that:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall

private property be taken for public use without just compensation.

U.S. CONST. amend. V.

STATEMENT OF THE CASE

This petition raises fundamental questions concerning the power of United States Government officials to completely disregard the Fourth Amendment to the Constitution when conducting investigations of American citizens travelling abroad. The factual setting involved in this case has yet to be presented to this Court, however, the Ninth Circuit has misapplied existing case law in reaching its decision.

Petitioners Brian Bennett and Michael Harris, both American citizens, were convicted, in large part, on evidence compiled by United States Government officials acting in concert with law enforcement officials in Denmark. During the time period when Brian Bennett was present in Denmark with an individual who was under scrutiny by the United States Government, Danish officials were requested to conduct visual and electronic surveillance of Brian Bennett. It was conceded at trial that United States officials had no probable cause to believe that Brian Bennett was involved in any criminal violations prior to the surveillances by the Danish. Nevertheless, at the behest of the United States Drug Enforcement Administration, Danish law enforcement officials convinced a Danish court to issue a blanket wiretap and bugging order as to Brian Bennett to garner information for the American investigation of Bennett's travelling

companion, Mario Villabona. While the wiretap order was purported to be valid under Danish law, American officials were fully aware that the Danes had misled the Danish court in violation of Danish law. In fact, serious questions existed and still exist as to the orders' validity under Danish law. The trial court found that a joint venture existed between United States and Danish officials in connection with the Danish wiretaps. No charges were ever developed or brought in Denmark as a result of the "joint venture." The evidence obtained as a result of these wiretaps were admitted at the trial of Brian Bennett and Michael Harris over strenuous objection of counsel. Brian Bennett and Michael Harris were subsequently convicted of violations of 21 U.S.C. § 841 and 21 U.S.C. § 848.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE NINTH CIRCUIT COURT OF APPEAL CONFLICTS WITH EXISTING CASE LAW REGARDING THE APPLICABILITY OF THE FOURTH AMENDMENT TO AMERICAN CITIZENS TRAVELLING ABROAD AS TO EVIDENCE SEIZED BY UNITED STATES LAW ENFORCEMENT ACTING IN A JOINT VENTURE WITH FOREIGN OFFICIALS.

Wiretap evidence may be admissible when foreign officials acting on their own to enforce foreign law, properly follow their own law in obtaining the evidence. *United States v. Cotroni*, 627 F.2d 708, 711-12 (2d Cir. 1975). This will hold true even in those instances where the subject of the foreign search is an American citizen. *United States v. Morrow*, 537 F.2d 120, 139 (5th Cir. 1976)

cert. denied, 430 U.S. 956, 97 S.Ct. 1602, 51 L.Ed.2d 806 (1977). The United States Government's cooperation with foreign law enforcement officials may implicate constitutional restrictions which could lead to a finding that the evidence may be excluded. *United States v. Paternina-Vergara*, 749 F.2d 993, 998 (2d Cir. 1984). When a search is conducted by foreign officials in conjunction with the substantial participation of the United States Government, the Fourth Amendment is applicable. *United States v. Stonehill*, 405 F.2d 738, 743 (9th Cir. 1968). The standard for exclusion of evidence arises in two specific circumstances; 1) where the conduct of foreign law enforcement officers rendered them as agents of the United States, see *United States v. Peterson*, 812 F.2d 486 (9th Cir. 1987) *United States v. Busic*, 592 F.2d 13 (2d Cir. 1978) and 2) where the cooperation between the United States and foreign law enforcement agencies is deemed to have been motivated to evade those constitutional requirements normally applicable to American officials. *See United States v. Verdugo-Urquidez*, 856 F.2d 1214 (9th Cir. 1988) *rev'd on other grounds*, 110 S.Ct. 1056 (1990); *United States v. Bagaric*, 706 F.2d 42, 69 (2d Cir. 1983).

This Court held in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) that the Fourth Amendment did not apply to noncitizens abroad vis-a-vis the actions of United States law enforcement officials. Therefore, the question of the Fourth Amendment rights of an American citizen in the exact same circumstance has not been reached by this Court. While this particular application of the Fourth Amendment has not been reached or determined, the Ninth Circuit's opinion overlooked the oft-cited language of this Court which stated that "[n]either

the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318, 57 S.Ct. 216, 220, 81 L.Ed. 255 (1936). *See also, United States v. Verdugo-Urquidez*, 494 U.S. at 362, 110 S.Ct. at 1060; *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1230 (9th Cir. 1988) (Wallace, J., dissenting) *rev'd on other grounds*, 494 U.S. 259 (1990).

In his dissent from the Ninth Circuit's opinion in this case, Judge Reinhardt carefully pointed out the error in the majority opinion. He wrote

> Indeed, until today, the only circumstance in which we have held that the Fourth Amendment does not apply to a search of a United States citizen conducted abroad is when the United States is not involved in the search. *United States v. Stonehill*, 405 F.2d 738, 753 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969). *Stonehill* explicitly held that the Fourth Amendment applies to a search by foreign officials when the participation of the United States government is sufficiently substantial to render a search or seizure a joint venture between the United States and the foreign government. *Stonehill*, 405 F.2d at 743. That is, as the majority correctly rules, the type of search involved here.
>
> Recognizing that existing precedent compels the conclusion that the Fourth Amendment is applicable, the majority addresses the question whether the search at issue violated the requirements of the Amendment. Here it commits a fundamental error. It holds that in all cases involving joint-venture searches of Americans abroad the lawfulness of the search for Fourth

> Amendment purposes depends entirely upon the vagaries of foreign law. Put simply, what the majority holds is that the only Fourth Amendment protections United States citizens who travel abroad enjoy vis-a-vis the United States government are those safeguards, if any, afforded by the laws of the foreign nation they visit. Under the majority's holding, the Fourth Amendment's requirements are wholly redundant since they provide nothing more than is already provided by foreign law. In fact, under the majority's rule, the Fourth Amendment provides even less protection than foreign law since, according to the principal case on which the majority relies, the Constitution does not even require foreign officials to comply with their own law; all that is required is that American officials have a good faith belief that they did so. *See Peterson*, 812 F.2d at 49 [sic]. Thus, even though the majority concedes that the Fourth Amendment applies to joint venture searches like the one before us, it holds that when Americans enter Iraq, Iran, Singapore, Kuwait, China, or other similarly inclined foreign lands, they can be treated by the United States government exactly the way those foreign nations treat their own citizens – at least for Fourth Amendment purposes.

United States v. Barona, et al., App., infra, 34a - 36a, Reinhardt, J., dissenting (footnotes omitted).

As Judge Reinhardt's dissent candidly demonstrates, the decision of the Ninth Circuit in this case fails to apply clearly applicable precedent to this facts of this case. As such, clarity is required in order to determine the particular extent to which American citizens are protected and

law enforcement officials are restrained by the provisions of the Fourth Amendment while on foreign soil.

II. THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS CONFLICTS WITH STATUTORY AND PRESIDENTIAL AUTHORITY REGARDING FOREIGN SURVEILLANCE ACTIVITIES OF OFFICIALS OF THE UNITED STATES

The Ninth Circuit's opinion serves to diminish the rights of a American citizen travelling abroad while enhancing the United States Government's ability to conduct unchecked investigatory procedures. This ruling runs afoul of 50 U.S.C. § 401 dealing with National Security. In particular, the decision contravenes Executive Order No. 12,333, 46 Fed. Reg. 59,941 (1981) promulgated under § 401. This provision of this Chapter is particularly relevant to the Ninth Circuit decision in that it sets forth Congressional intent with regard to the exercise of extra-territorial conduct by American Intelligence Agencies and their information gathering capacities. Section 2.1 *et seq.* of Part II of Exec. Order No. 12,333 sets forth the need and purpose for the collection of information setting forth significant concerns in the areas of National Defense and Foreign Relations. As is specifically pointed out in Section 2.1:

> Accurate and timely information about the capabilities, intentions and activities of foreign powers, organizations, or persons and their agents is essential to informed decisionmaking in the areas of National Defense and Foreign

> Relations. Collection of such information is a priority objective and will be pursued in a vigorous innovative and responsible manner that is consistent with the Constitution and applicable law and respectful of the principles upon which the United States was founded.

Exec. Order No. 12,333, § 2.1.

Clearly, Congress has indicated that restraints are applicable in the two (2) most important areas involving the viability of the Republic; National Defense and Foreign Relations. Thereafter in Part II of Exec. Order No. 12,333, significant discussions of collection of information is set forth. In Section 2.4, it indicates that agencies are not authorized to use such techniques as electronic surveillance, unconsented physical search, overt surveillance, physical surveillance, or monitoring devices unless they are in accordance with the procedures established by the head of the agency concerned and approved by the Attorney General. These requirements are delineated by Congress to "protect Constitutional and other legal rights and limit use of such information to lawful Governmental purposes." Exec. Order No. 12,333, § 2.4.

What is particularly illuminating about the permissions to surveill given to intelligence agencies is that specific Attorney General approval is required under Section 2.5. Not only is Attorney General approval required before the engaging into extensive surveillance but also that the strictures placed thereon are illustrative for purposes of this matter. Congress requires the Attorney General's approval and imposes on the Attorney General the duty of ascertaining *probable cause* before engaging in or allowing agencies under the authority of the Attorney

General to engage in electronic and other surveillance techniques abroad. Section 2.5 reads as follows:

> The Attorney General hereby is delegated the power to approve the use for intelligence purposes, within the United States or against a United States person abroad, of any technique *for which a warrant would be required if undertaken for law enforcement purposes, provided that such technique shall not be undertaken unless the Attorney General has determined in each case that there is probable cause to believe that the technique is directed against a foreign power or an agent of a foreign power*. Electronic surveillance, as defined in the Foreign Intelligence Surveillance Act of 1978 . . . shall be conducted in accordance with that Act, as well as this Order.

Exec. Order No. 12,333, § 2.5 (emphasis added).

Certainly an American citizen abroad should be entitled to the same protection if suspected of a crime (which carries with it a much less severe threat to the well-being of the public weal than does National Defense) than a violation of an act involving the actual survival of the nation or matters relating to International Terrorism. It would be axiomatic to say that if Congress requires probable cause to wiretap an American citizen engaged in potential acts of treason abroad there is no reason to assume that a lesser standard would be acceptable to Congress for an American citizen merely suspected of some criminal act. The protection of the laws in any event should be equal. An American citizen is entitled under the United States Constitution to the equal protection of its laws and a failure to provide protections similar to

those set forth in 50 U.S.C. § 401 would be a violation of that as well. It would be difficult to set a rational basis for a distinction that would treat an American citizen who is a traitor to his nation with a greater protection of the laws than for any other citizen. Absent such rational basis, a denial of equal protection occurs.

Finally, in the Ninth Circuit opinion, the court placed much emphasis on the concept of the reasonableness of the American agents belief in the propriety of the actions of the foreign police agencies under foreign laws. The awareness of the requirements set forth under the Intelligence Act strikes at the very underpinning of that analysis. The agents were fully aware of the standards set in Section 2.5, consequently any activities to circumvent same were per se unreasonable.

THE QUESTIONS PRESENTED ARE IMPORTANT

The Ninth Circuit's opinion on the issue presented in this case of the applicability of the Fourth Amendment to U.S. citizens abroad affects a rule of national application in that it concerns the rights of all citizens who travel internationally for business and pleasure. There is an overriding need for national uniformity so that citizens, as well as law enforcement and the judiciary, can be certain as to the extent of United States constitutional protections in foreign lands. If the above-quoted language from this Court's opinion in the *Curtiss-Wright* case has any viability, this Court must hear this case in the interest of clarity. While this Court has made substantial steps in defining Fourth Amendment jurisprudence

through cases such as the *Verdugo-Urquidez* and *Leon* opinions, the protections afforded American citizens travelling abroad are not clearly defined, as evidenced by the Ninth Circuit's opinion in this case. It is critical that this Court express its opinion on this fundamental issue concerning a United States citizen's Fourth Amendment rights. As Judge Reinhardt's dissenting opinion explained

> The facts of this case exemplify the disastrous consequences of the majority's holding and the extent to which the opinion strips our citizens of fundamental safeguards against arbitrary invasions of their privacy by their own government. Here, the government does not contend that it had probable cause to obtain a court order permitting the interception of the phone calls of the defendants. Thus, had the defendants remained in this country, the government could not have tapped their telephones. What the government did was wait until they crossed the border. It then requested officials of another country, Denmark, which had at best an attenuated interest in the matter, to act as agents for the United States and tap the telephones of American citizens. By doing so, the government arbitrarily exercised its power over the defendants free of the constitutional constraints that the Bill of Rights imposes. The majority's failure to require our government to have probable cause to initiate this search makes clear that its "application" of the Fourth Amendment to this case serves only to perpetuate a myth, if not a fraud, on the public when it represents that the Fourth Amendment applies to Americans abroad and that it provides Americans with meaningful protection outside our borders. Certainly, that will

> no longer be case if the majority opinion is allowed to stand. . . .
>
> Early in this century, the Supreme Court warned that courts "must be vigilant to scrutinize attendant facts [surrounding a search] with an eye to detect and a hand to prevent violations of the Constitution by circuitous and indirect methods." *Byars v. United States*, 273 U.S. 28, 33 (1927). In our leading case involving foreign searches initiated by the United States government, this court warned that "[a] federal agent must not be permitted to do indirectly what he cannot do directly, and thus circumvent the provisions of the Fourth Amendment against unreasonable search and seizure." *Stonehill*, 405 F.2d at 746. The majority's failure to heed these warnings ensures that when, as here, the United States government is unable to obtain a search warrant because it lacks probable cause, it can simply wait until a suspect goes abroad and then instruct a friendly or submissive foreign government to conduct the search on its behalf. Thus, the government is now free to conduct foreign searches in a manner that circumvents the requirements of the Constitution and to achieve indirectly what it cannot achieve directly. Even more important, the majority's decision drives one more nail in the coffin of the Fourth Amendment, and leaves all Americans with less protection against arbitrary governmental actions than they enjoyed before the majority spoke.

United States v. Barona, et al., App., *infra*, 36a - 37a, 48a - 49a.

These words of Judge Reinhardt emphasize the importance of the question presented in this petition.

Additionally, it is apparent that the Ninth Circuit's opinion works a violation of equal protection under the Fifth Amendment to the Constitution. As such, the opinion raises a question of great public importance. Under the Ninth Circuit opinion, American law enforcement is not bound by the edicts of the Congress and the President with regard to constitutional rights. Therefore, it is essential that this Court hear the matter to correct a grave error committed by the Ninth Circuit Court of Appeals.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED JUNE 5, 1995.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. MARIA CECILIA BARONA, *Defendant-Appellant.*	No. 90-50519 D.C. No. CR-88-0972-WJR-3 OPINION
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. JANET MARTINEZ, aka: LUZ JANET MARTINEZ & LUZ JANETH MARTINEZ, *Defendant-Appellant.*	No. 90-50536 D.C. No. CR-88-0972-WJR-4
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. BRIAN BENNETT, *Defendant-Appellant.*	No. 90-50686 D.C. No. CR-88-0972-WJR-2

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. MARIO ERNESTO VILLABONA-ALVARADO, a/k/a Tico, *Defendant-Appellant.*	No. 90-50687 D.C. No. CR-88-0972-WJR-1
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. MICHAEL DUBARRY MCCARVER, a/k/a Mike Bald, *Defendant-Appellant.*	No. 90-50691 D.C. No. CR-88-0972-WJR-7
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. MICHAEL HARRIS, a/k/a Tall Make, *Defendant-Appellant.*	No. 90-50694 D.C. No. CR-88-0972-WJR-6

Appeals from the United States District Court
for the Central District of California
William J. Rea, District Judge, Presiding

Argued and Submitted
October 5, 1994 – Pasadena, California

Filed June 5, 1995

Before: J. Clifford Wallace, Chief Judge,
Stephen Reinhardt, Circuit Judge, and Jack E. Tanner,*
District Judge.

Opinion by Chief Judge Wallace; Concurrence by
Judge Tanner; Dissent by Judge Reinhardt

SUMMARY

**Criminal Law and Procedure/Wire Tapping/
Search and Seizure**

The court of appeals affirmed in part a district court judgment, reversed in part and remanded. The court held that evidence from foreign wiretaps was not subject to exclusion under the Fourth Amendment.

Appellants Mario Villabona-Alvarado and Brian Bennett organized and supervised a cocaine distribution operation. Cocaine was delivered by appellants Maria Barona and Luz Martinez to appellants Michael McCarver and Michael Harris.

Telephone calls made by Villabona-Alvarado were monitored by Danish or Italian authorities in Denmark

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* Honorable Jack E. Tanner, United States District Judge, Western District of Washington, sitting by designation.

and Italy. An indictment resulted in the arrests of Barona, Martinez, Bennett, Villabona-Alvarado, McCarver and Harris on drug-related charges. Villabona-Alvarado and Bennett were also charged with running a continuing criminal enterprise (CCE).

At trial, tapes of the wiretaps of Villabona-Alvarado's calls in Denmark and Italy were played for the jury and were relied on at least in part to convict Villabona-Alvarado, Bennett, Martinez, Barona, Harris and McCarver. In regard to the CCE charge, the government produced an extensive list of individuals, allowing the jury to pick those it felt met the definition of "supervisee." The jury found Villabona-Alvarado and Bennett guilty of running a CCE. The defendants appealed.

[1] Martinez, Barona and Villabona-Alvarado were not United States citizens. [2] The Fourth Amendment protects only "the People of the United States." [3] It was not clear that Villabona-Alvarado or the other non-citizen defendants were entitled to receive any Fourth Amendment protection.

[4] The district court did not clearly err in finding that the four Danish wiretaps at issue were "joint ventures." The "American Embassy" was interested in the movement of Villabona-Alvarado and Bennett, American agents requested the wiretaps, information obtained was immediately forwarded to them, and throughout the surveillance an interpreter was provided by the United States. [5] However, Danish law was complied with for each Danish wiretap. In addition, the finding that the Milan wiretap was not a joint venture was not clearly

erroneous. Thus, none of the evidence from the wiretaps was subject to exclusion under the Fourth Amendment.

[6] In regard to the CCE charge, the jury was not instructed that individuals qualified as supervisees only if they were those over whom Villabona-Alvarado or Bennett exercised managerial responsibility. If certain individuals were, as a matter of law, incapable of counting as supervisees, the jury needed to have been instructed of that. [7] Among the list of people whom the jury was told that it could choose, there existed individuals that the jury was not allowed to choose as a matter of law. [8] There were no instructions directing the jury to exclude one who was only a customer. Thus, the verdicts on the CCE counts had to be reversed.

District Judge Tanner concurred, rejecting Judge Reinhardt's inference that the makeup of the panel affected the outcome of the case in any way other than in the normal course of the decision-making process.

Circuit Judge Reinhardt dissented, noting that there was no convincing justification that could be offered for abandoning the probable cause requirement with regard to foreign searches.

COUNSEL

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Henry F. Reynolds, Santa Monica, California, for defendant-appellant McCarver.

Dean G. Dunlavey, Assistant United States Attorney, Los Angeles, California, for the plaintiff-appellee.

OPINION

WALLACE, Chief Judge:

Following extensive investigation, including wiretaps in foreign countries, the appellants were indicted and convicted of drug-related crimes. The district court had jurisdiction under 18 U.S.C. § 3231. We have jurisdiction over this timely appeal pursuant to 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291. We affirm in part, reverse in part, and remand.

I

The issues we discuss arose in the context of a criminal prosecution of six individuals for an ongoing conspiracy to distribute cocaine. Mario Ernesto Villabona-Alvarado (Villabona) and Brian Bennett organized and supervised the operation. Cocaine from Columbia entered the United States through a source named "Oscar." The cocaine was then delivered by Maria Barona and Luz Janneth Martinez to Michael McCarver and Michael Harris for further distribution.

Several events led to the identification of this conspiracy and its participants. Between 1985 and 1987, the Drug Enforcement Administration (DEA) and the Los Angeles Police Department conducted a money-laundering investigation code-named "Operation Pisces." The result of this investigation was the arrest of Leonardo Gomez in Villabona's residence. Then in December 1987, Villabona and Bennett traveled to Copenhagen, Denmark, and registered at the Savoy Hotel. On December 7, 1987, Villabona, his wife (Helle Nielsen), and Bennett traveled to Aalborg, Denmark, to stay with Nielsen's parents. While in Aalborg, Villabona placed calls from the Nielsen residence and from a public telephone. On December 8, 1987, Villabona and Bennett returned to Copenhagen and stayed at the Hotel Sara-Dan. From Copenhagen, Villabona and Bennett flew to Milan, Italy, and registered at the Hilton International Hotel on December 9, 1987. In late March 1988, Villabona returned to Aalborg, Denmark, and again used the same public telephone. In each of these locations, the telephone calls made by Villabona were monitored by the Danish (or in one case, Italian) authorities. Tapes of these wiretaps were played for the jury and were relied on at least in part to convict Villabona, Bennett, Martinez, Barona, Harris, and McCarver.

Between March and November 1988, Bennett asked Stanley McCarns to transport 502 kilograms of cocaine from Los Angeles to Detroit and to return with millions of dollars. Stanley McCarns then arranged for Willie Childress and his cousin, James McCarns, to transport the cocaine. Childress and James McCarns were stopped en route on November 6, 1988, and a Missouri state trooper

seized the cocaine. On November 11, 1988, domestic wiretaps commenced on two cellular telephones used by Villabona. These taps also resulted in the interception of several incriminating conversations.

A 28-count indictment resulted in the arrests of the six appellants. While we have disposed of the majority of the appellants' claims in an unpublished disposition, *see* Fed. R. App. P. 36; Ninth Cir. R. 36-1, two issues raised in this appeal require publication. *See* Ninth Cir. R. 36-2. The first of these issues, of concern to all of the appellants, is whether any or all of the wiretap evidence obtained in Denmark and Italy should have been suppressed. The second issue is whether count 27 charging Villabona and count 28 charging Bennett with running a continuing criminal enterprise in violation of 21 U.S.C. § 848, should be vacated because the jury may have impermissibly found that certain individuals counted as supervisees for purposes of section 848(c)(2)(A).

II

The district court ruled on the motion to suppress the Denmark wiretap evidence as follows:

> [T]he Court agrees with the Defense, that other than the Milan Wiretap, that these were wiretaps which were engaged in as a joint venture by the United States and Denmark. . . . [T]he Court finds that the order issued by the Danish Court was lawful and in accordance with their law. . . . The Court finds that the United States authorities reasonably relied upon the representations of the Danish officials with respect to the

> wiretaps, and therefore they were acting – in the Court's opinion – in good faith.

The question of whether the wiretaps were a joint venture requires the district court to "scrutinize the attendant facts." *United States v. Rose*, 570 F.2d 1358, 1362 (9th Cir. 1978) (*Rose*), *quoting Byars v. United States*, 273 U.S. 28, 32 (1927). Therefore, we will not disturb such a finding unless it is clearly erroneous. We review de novo, however, the finding that the wiretaps were conducted in accordance with foreign law, *United States v. Peterson*, 812 F.2d 486, 490 (9th Cir. 1987) (*Peterson*), as well as the question of whether United States agents reasonably relied in good faith upon the foreign officials' representations that the wiretaps were legal under foreign law. *See United States v. Mendonsa*, 989 F.2d 366, 369 (9th Cir. 1993) (issue of good faith reliance on domestic search warrant reviewed de novo).

A.

When determining the validity of a foreign wiretap, we start with two general and undisputed propositions. The first is that Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-21,"has no extraterritorial force." *Peterson*, 812 F.2d at 492. Our analysis, then, is guided only by the applicable principles of constitutional law. The second proposition is that "[n]either our Fourth Amendment nor the judicially created exclusionary rule applies to acts of foreign officials." *United States v. LaChapelle*, 869 F.2d 488, 489 (9th Cir. 1989), *quoting United States v. Maher*, 645 F.2d 780, 782 (9th Cir. 1981).

Two "very limited exceptions" apply. *Id.* One exception, clearly inapplicable here, occurs "if the circumstances of the foreign search and seizure are so extreme that they 'shock the [judicial] conscience,' [so that] a federal appellate court in the exercise of its supervisory powers can require exclusion of the evidence." *Id.* at 490, *quoting Rose*, 570 F.2d at 1362 (further citations omitted). This type of exclusion is not based on our Fourth Amendment jurisprudence, but rather on the recognition that we may employ our supervisory powers when absolutely necessary to preserve the integrity of the criminal justice system. The wiretaps at issue cannot be said to shock the conscience. Even when no authorization for a foreign wiretap was secured in violation of the foreign law itself, we have not excluded the evidence under this rationale, *Peterson*, 812 F.2d at 491, nor should we. Here, the foreign courts were involved and purported to authorize the wiretaps. The conduct here, therefore, does not come close to requiring the invocation of this exception.

The second exception to the inapplicability of the exclusionary rule applies when "United States agents' participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials." *Id.* at 490. If a joint venture is found to have existed, "the law of the foreign country must be consulted at the outset as part of the determination whether or not the search was reasonable." *Id.*[1] If foreign

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[1] Judge Reinhardt's worry that we look solely to the "vagaries of foreign law," dissent at 6233, and therefore strip "our citizens of fundamental safeguards against arbitrary invasions of their privacy," *id.* at 6234, is unfounded. Our discussion

law was not complied with, "the good faith exception to the exclusionary rule becomes part of the analysis." *Id.* at

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immediately preceding this paragraph clearly shows that where the circumstances of a search are so extreme as to shock the conscience, supervisory powers can be imposed to exclude the evidence. In addition, our citizens are protected by the full panoply of Fifth Amendment rights at trial.

Furthermore, Judge Reinhardt misreads *Peterson* when he argues that foreign law is "part of" the analysis – thereby inferring that there is some additional requirement, such as "probable cause," that must be satisfied. Read in context, *Peterson* makes it clear that the other part of the inquiry is whether the United States agents acted in good faith, even if foreign law was violated (as in *Peterson*). *Peterson*, 812 F.2d at 491-92. But compliance with foreign law alone determines whether the search violated the Fourth Amendment. *See id.* at 491 ("local law of the Philippines governs whether the search was reasonable"). *Peterson* did not "repeatedly emphasize," dissent at 6240, any other point.

In support of his contention that a foreign search must not only comply with applicable foreign law but must also be supported by probable cause, Judge Reinhardt relies heavily on certain language from *Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (*Reid*). *See* Dissent at 6231-32. Judge Reinhardt's reliance on Reid is erroneous. Judge Reinhardt fails to acknowledge that *Reid*'s "noble vision of the Constitution," *id.* at 6232, would have been in a dissent were it not for the concurrences of Justices Frankfurter and Harlan, who "resolved the case on much narrower grounds than the plurality and declined even to hold that United States citizens were entitled to the full range of constitutional protections in all overseas criminal prosecutions." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270 (1990) (*Verdugo*). Thus, a majority of the Supreme Court in *Reid* rejected the view Judge Reinhardt endorses. Finally, just five years ago the Supreme Court unequivocally refused to conclude that *Reid* stands for the "sweeping proposition" ascribed to it by Judge Reinhardt. *See Verdugo*, 494 U.S. at 270 (Declining to interpret *Reid* as holding "that federal officials are constrained by the

492. "The good faith exception is grounded in the realization that the exclusionary rule does not function as a deterrent in cases in which the law enforcement officers

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Fourth Amendment wherever and against whomever they act" and explaining that *Reid* decided only "that United States citizens stationed abroad could invoke the protection of the *Fifth and Sixth Amendments.*") (emphasis added); *see also id.* at 277-78 (Kennedy, J., concurring) (Adopting language from Justice Harlan's concurrence in *Reid* refusing to agree "with the suggestion that every provision of the Constitution must always be deemed automatically applicable to American citizens in every part of the world.").

Undaunted and without citation, Judge Reinhardt opines that "[p]robable cause is the fundamental requirement that must be satisfied before our government can initiate searches." Dissent at 6235-36. In *Terry v. Ohio*, 392 U.S. 1 (1968) (*Terry*), however, the Supreme Court rejected the principle that probable cause must support every search and seizure. *Id.* at 20. As the Court explained:

> If this case involved police conduct subject to the Warrant Clause of the Fourth Amendment, we would have to ascertain whether "probable cause" existed to justify the search and seizure which took place. . . . But we deal here with an entire rubric of police conduct . . . which historically has not been, and as a practical matter could not be, subject to the warrant procedure. Instead, the conduct involved must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures.

Id. Like the search and seizure involved in *Terry*, foreign searches have neither been historically subject to the warrant procedure, nor could they be as a practical matter.

Judge Reinhardt errs in failing to look to the text of the Fourth Amendment itself, and instead substitutes his words for those of the Framers. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no

acted on a reasonable belief that their conduct was legal." *Id.*

> Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or places to be seized.

Upon reading the Fourth Amendment, one cannot help but realize two things. First, it is clear that the amendment contains two independent clauses. The first clause prohibits "unreasonable" searches and seizures. The second clause, the Warrant Clause, describes the procedures that must be followed in obtaining a warrant. The probable cause requirement is part of the procedures contained in the Warrant Clause. Yet nothing in the Fourth Amendment suggests that all searches or seizures must be conducted with a warrant and be supported by probable cause. Indeed, *Terry* and a long line of Supreme Court authority holds to the contrary. *See Terry*, 392 U.S. at 20; *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (search of probationer's home without warrant or probable cause allowed because regulation requiring reasonable grounds for search satisfied Fourth Amendment); *O'Connor v. Ortega*, 480 U.S. 709, 722-23 (1987) (no warrant or probable cause required for search of public employee's office; search need only be reasonable); *New Jersey v. T.L.O.*, 469 U.S. 325, 340-41 (1985) (*T.L.O.*) (warrant and probable cause not necessary for search of school children for contraband); *United States v. Martinez-Fuerte*, 428 U.S. 543, 561-62 (1976) (authorizing stop of vehicles at fixed checkpoint away from the border with Mexico and brief questioning of occupants even in the absence of any individualized suspicion that the vehicle contains illegal aliens); *United States v. Brignoni-Ponce*, 422 U.S. 873, 881-82 (1975) (Border Patrol may stop vehicles briefly and ask occupants about their citizenship, immigration status, and any suspicious circumstances without warrant or probable cause if they have articulable suspicion); *see also Camara v. Municipal Court*, 387 U.S. 523, 534-35 (1967) (housing code inspections may be made pursuant to area warrant not based on individualized probable cause). Reasonableness, not probable

It is this exception that the appellants invoke, asking us to conclude (1) that the United States and foreign

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cause, is undoubtedly the touchstone of the Fourth Amendment. As the Supreme Court has explained, " 'probable cause' is not an irreducible requirement of a valid search. The fundamental command of the Fourth Amendment is that searches and seizures be reasonable, and although 'both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, . . . in certain limited circumstances neither is required.' " *T.L.O.*, 469 U.S. at 340, *quoting Almeida-Sanchez v. United States*, 413 U.S. 266, 277 (1973) (Powell, J., concurring).

Judge Reinhardt suggests that even if a foreign search need not comply with the requirements of the Warrant Clause, such a search must nevertheless be supported by probable cause in order to be reasonable. Dissent at 6238-39 n.9, *quoting Verdugo*, 494 U.S. at 279 (Blackmun, J., dissenting). At least five justices in *Verdugo* expressly rejected such a notion. Judge Reinhardt then chides us for not following our *Verdugo* panel opinion. Dissent at 6241-43. We are bewildered by the attack. It was this *Verdugo* panel majority position that was rejected by the Court. The Court explained:

> [T]he Court of Appeals held that absent exigent circumstances, United States agents could not effect a "search or seizure" for law enforcement purposes in a foreign country without first obtaining a warrant – which would be a dead letter outside the United States – from a magistrate in this country. *Even if no warrant were required, American agents would have to articulate specific facts giving them probable cause to undertake a search or seizure if they wished to comply with the Fourth Amendment as conceived by the Court of Appeals.*

Verdugo, 494 U.S. at 274 (emphasis added). Relying on the text of the amendment, its history, and prior Supreme Court cases concerning its extraterritorial application, the majority of the Court expressly rejected this view. *See id.*

officials were engaged in a joint venture, (2) that a violation of foreign law occurred making the search unreasonable, and (3) that the United States did not rely in good faith upon the foreign officials' representations that their law was being complied with.

Although the reasoning of a vacated opinion may be looked to as persuasive authority if its reasoning is unaffected by the decision to vacate, the simple fact is that the Supreme Court categorically rejected the majority reasoning in *Verdugo* and instead adopted that of the dissent. *See Verdugo*, 494 U.S. 259. Moreover, as indicated above, the Court expressly rejected the very conclusion – that a foreign search must be based on probable cause even if no warrant is required – that Judge Reinhardt thinks we should draw from our vacated panel opinion.

Having ignored the text of the Fourth Amendment, the pertinent Supreme Court decisions, and *Peterson*'s rationale, Judge Reinhardt is forced to fall back on a vacated Ninth Circuit opinion, language from a plurality opinion which has subsequently been rejected by the Supreme Court, and language from a Supreme Court dissent as his "persuasive authority." Dissent at 6238-39 n.9, 6241-43. Perhaps this accounts for his editorial beginning, *id.* at 6229, and his strikingly strident comment that the "panel composition, not persuasive legal analysis, has determined the result in this case." *Id.* at 6243. We, of course, see it differently. This panel was properly composed. *See* Rules of the United States Court of Appeals for the Ninth Circuit, Introduction: Court Structure and Procedures at xx. Judge Reinhardt's conclusion that the result here "would indeed have been different," dissent at 6243 n.15, had the original *Verdugo* panel heard this case is wishful speculation. Unlike Judge Reinhardt, the judges on that panel may well have recognized that the Supreme Court rejected its original rationale and thus agreed that the result reached here is correct. We conclude our analysis is persuasive, based upon precedent and sound reasoning. We do not see those values in the dissent.

B.

[1] Because this exception is based solely on the Fourth Amendment, the appellants must first show that they are among the class of persons that the Fourth Amendment was meant to protect. In this case, three appellants, Martinez, Barona, and Villabona, are not United States citizens.

The Supreme Court has said, with regard to foreign searches involving aliens with "no voluntary connection" to the United States, that the Fourth Amendment is simply inapplicable. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 274-75 (1990) (*Verdugo*). *Verdugo* reversed a decision of this circuit in which the panel majority found the Fourth Amendment applicable to a search of a Mexican citizen's Mexicali residence. *See United States v. Verdugo-Urquidez*, 856 F.2d 1214 (9th Cir. 1988) (*Verdugo-Urquidez*), *rev'd*, 494 U.S. 259 (1990). The Supreme Court rejected this court's "global view of [the Fourth Amendment's] applicability [which] would plunge [us] into a sea of uncertainty as to what might be reasonable in the way of searches and seizures conducted abroad." *Verdugo*, 494 U.S. at 274.

[2] Unlike the Due Process Clause of the Fifth Amendment, which protects all "persons," the Fourth Amendment protects only "the People of the United States." *Id.* at 265 (explaining that the term "people" used in the Fourth Amendment was a term of art employed in selected parts of the Constitution to refer to "the People of the United States"). This term "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this

country to be considered part of that community." *Id., citing United States ex rel. Turner v. Williams,* 194 U.S. 279, 292 (1904). The Fourth Amendment therefore protects a much narrower class of individuals than the Fifth Amendment.

Because our constitutional theory is premised in large measure on the conception that our Constitution is a "social contract," *Verdugo-Urquidez,* 856 F.2d at 1231-33, "the scope of an alien's rights depends intimately on the extent to which he has chosen to shoulder the burdens that citizens must bear." *Id.* at 1236; *see also Verdugo,* 494 U.S. at 272-73 (explaining that the Supreme Court has yet to decide whether the Fourth Amendment applies at all to illegal aliens in the United States). "Not until an alien has assumed the complete range of obligations that we impose on the citizenry may he be considered one of 'the people of the United States' entitled to the full panoply of rights guaranteed by our Constitution." *Id.*

The term "People of the United States" includes "American citizens at home and abroad" and lawful resident aliens within the borders of the United States "who are victims of actions taken *in the United States* by American officials." *Verdugo-Urquidez,* 856 F.2d at 1234 (Wallace, J., dissenting) (emphasis in original). It is yet to be decided, however, whether a resident alien has undertaken sufficient obligations of citizenship or has "otherwise developed sufficient connection with this country," *Verdugo,* 494 U.S. at 265, to be considered one of "the People of the United States" even when he or she steps outside the territorial borders of the United States.

[3] It is not clear, therefore, that Villabona or the other non-citizen defendants in this case are entitled to receive any Fourth Amendment protection whatsoever. Any entitlement that they may have to invoke the Fourth Amendment in the context of an *extraterritorial* search is by no means clear. We could hold, therefore, that Barona, Martinez, and Villabona have failed to demonstrate that, at the time of the extraterritorial search, they were "People of the United States" entitled to receive the "full panoply of rights guaranteed by our Constitution." *Verdugo-Urquidez*, 856 F.2d at 1236. We choose, however, not to reach the question because even if they were entitled to invoke the Fourth Amendment, their effort would be unsuccessful.

C.

Bennett, Harris, and McCarver are all United States citizens, and thus can invoke the protection of the Fourth Amendment generally. Our cases establishing the exception as to when the Fourth Amendment can be invoked in an extraterritorial search control our analysis.

[4] First, the district court did not clearly err in finding that the four Danish wiretaps at issue were "joint ventures." In *Peterson*, we gave weight to the fact that the DEA "was involved daily in translating and decoding intercepted transmissions as well as advising the [foreign] authorities of their relevance." 812 F.2d at 490. Similarly here, the "American Embassy" was interested in the movement of Villabona and Bennett, American agents

requested the wiretaps, information obtained was immediately forwarded to them, and throughout the surveillance a Spanish to English interpreter was provided by the United States.

Because there was a joint venture, we must decide whether the search was reasonable. In determining whether the search was reasonable, we must first consult the law of the relevant foreign countries. *Id.* at 491. The relevant provisions of Danish law are: (1) section 191 of the Danish Criminal Code (Code) and (2) sections 780-791 of the Danish Administration of Justice Act (Justice Act).

Justice Act § 781(1) authorizes the intervention of secret communications, including the wiretapping of telephonic communications, if: (1) "weighty reasons" exist to assume messages are being conveyed via the medium in question, (2) the intervention is of decisive importance to the investigation, and (3) the investigation concerns an offense punishable by six or more years or is one of several other specifically enumerated offenses. Under Code § 191(1), the drug offenses at issue here are punishable by six or more years, thus satisfying section 781(1)(3).

In addition to these three requirements under Justice Act § 781(1), Danish law is somewhat more strict when it comes to monitoring conversations by use of a listening device or "bug" rather than by the tapping of telephone lines. Justice Act § 781(4) allows the use of such devices to intercept communications only if the suspected offense involves "danger to the lives or welfare of human beings or considerable social assets." This latter section was relevant to the Danish Court in two of the surveillances

because the government sought to use both a listening device and wiretaps. The section is not relevant to us, however, because it appears that no surveillance evidence, other than wiretap evidence, was used at trial. Even if such evidence were admitted, however, section 781(4) was followed.

Justice Act § 783 outlines procedures to acquire a wiretap, section 784 provides for an attorney to be appointed for the target party, and section 788 provides for notification of the wiretap to the target party, unless the court omits or postpones such notification under section 788(4). After carefully reviewing the record, we are satisfied that Danish law was followed.

1.

The first monitoring of communications occurred at the Savoy Hotel, Copenhagen, from December 4 to 7, 1987. The Danish police monitored communications both by tapping the hotel telephone lines, and by installing an electronic listening device in Villabona's room. In accordance with Danish law, the court held a hearing on December 5, 1987, at 10:00 a.m. to determine whether the wiretap and electronic eavesdropping, begun on December 4, 1987, was to be maintained. Justice Act § 783(3) allows police to make the necessary intervention subject to court approval within 24 hours. The Danish court gave its approval based on information that Villabona, Nielsen (who is not a party in this appeal), and Bennett (the occupants of the room) were suspected of violations of Code § 191, that they had transferred large amounts of money to Danish bank accounts, and that within a few

days they had spent thousands of dollars on telephone calls. The Danish court concluded: "According to the available information, including, especially the transfers of money and the extent of the telephone bills, definite reasons exist to believe that the said telephone is being used to give information to, or from, a person suspected of violation of Penal Code § 191." These findings satisfied Justice Act §§ 781(1), (3), and the Danish court satisfied Justice Act § 781(2) by determining that the monitoring was of definite importance to the investigation. The targeted parties had been appointed counsel according to Justice Act § 784(1)(1)-(3). The court authorized the monitoring until December 11, 1987.

2.

The second wiretaps were of the Nielsen residence and the public telephone, Aalborg, from December 7 to 9, 1987. On December 7, 1987, the court was notified that Villabona, Bennett, and Nielsen had made plans to travel to Aalborg. The Danish police then requested permission to monitor the telephone at Nielsen's residence in Aalborg, as well as authorization to install an electronic eavesdropping device in any hotel rooms they might move to, and to monitor any telephone calls from any such hotel rooms. The court granted the requested authorization until December 11, 1987.

After investigators observed Villabona making calls from the public telephone in Aalborg, Danish officials requested that the public telephone calls also be monitored. The Aalborg court allowed the monitoring of the public telephone calls until December 11, 1987. Again, the

provisions of the Justice Act were followed. On December 18, 1987, the court, in accordance with Justice Act § 788 found that Nielsen and the owner of the public telephone "should not be informed about the phone bugging undertaken, as disclosure would be damaging to the investigation of the case."

3.

The third wiretap involved the Hotel Sara-Dan, Copenhagen, from December 8 to 9, 1987. On December 9, 1987, the Copenhagen Municipal Court was told that on December 8 a tap was placed on a telephone at the Hotel Sara-Dan. Villabona and Bennett had returned from Aalborg to Copenhagen so that they could fly to Milan on December 9, 1987. The court, in accordance with Justice Act § 781, found that "definite reasons" existed to believe that the monitored communications contained information concerning suspected violations of Penal Code § 191, and that the monitoring "must be considered of decisive importance for the investigation." The monitoring stopped on December 9 because Villabona, Bennett, and Nielsen left the hotel. As in the previous episodes, the court waived the "duty to notify" the targets in accordance with Justice Act § 788(4).

4.

The fourth tap involved the Nielsen residence and the public telephone, Aalborg, from March 28 to April 16, 1988. The Aalborg court was informed that Villabona and Nielsen were to return to Aalborg on March 28. Permission to tap the telephone at Nielsen's residence and the

public telephone were sought. The Aalborg court found that based on Villabona's and Nielsen's last visit and telephone use, the tap was justified under the Justice Act. The tap was to expire on April 22, 1988, "with the provision that monitoring must be discontinued immediately if the defendants move."

5.

A fifth wiretap occurred in Milan, Italy. On December 9, 1987, Villabona and Bennett arrived in Milan from Copenhagen. The day before, the Danish police notified a United States special agent of this planned trip. He, in turn, telephoned a United States special agent in Milan and requested physical surveillance. The latter agent contacted Major Rabiti of the Guardia Di Finanza and requested a watch on Villabona and Bennett. Rabiti obtained authorization to wiretap their hotel room.

The district court found that this wiretap was not the product of a joint venture between United States and Italian authorities. That a United States agent told Rabiti about Villabona and Bennett did not create a "joint venture" between the United States and Italy regarding this wiretap. *See Stonehill v. United States*, 405 F.2d 738, 741 (9th Cir. 1968) (information provided to foreign official which led to search does not render investigation "joint"), *cert. denied*, 395 U.S. 960 (1969). We hold that the district court did not clearly err when it found no joint investigation surrounding the Milan wiretap, and, therefore, that Fourth Amendment principles do not apply. *Peterson*, 812

F.2d at 490. Because the wiretap was conducted by foreign officials without substantial United States involvement, the results are admissible.

[5] In summary, the finding that the Milan wiretap was not a joint venture is not clearly erroneous. The finding that the Danish wiretaps were conducted pursuant to a joint venture is also not clearly erroneous, but Danish law was complied with for each Danish wiretap. None of the evidence from the wiretaps is therefore subject to exclusion under the Fourth Amendment.

III

The second issue that we must resolve concerns only Villabona and Bennett. Counts 27 and 28 of the indictment charged Villabona and Bennett with being principal administrators, organizers, or leaders of a continuing criminal enterprise in violation of 21 U.S.C. § 848. According to section 848(c)(2)(A), the continuing series of violations that make up the continuing criminal enterprise must be undertaken "in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management." The jury was told that it must find unanimously that a defendant charged with being a principal administrator, organizer or leader of a continuing criminal enterprise, must have, among other things, "occupied a position of organizer, supervisor or manager of the five or more persons." The jury found Villabona and Bennett guilty of running a continuing criminal enterprise. In accordance with section 848(b)(1), both were sentenced to life imprisonment.

To prove that Villabona and Bennett were principal administrators, the government did not merely present the jury with five persons it claimed were supervised by Villabona or Bennett. Rather, the government produced an extensive list of individuals, allowing the jury to pick those it felt met the definition of supervisee. The government named 12 possible supervisees of Villabona, and 8 people as potential supervisees of Bennett.

Among each list of supervisees was, the government concedes, at least one person who could not *legally* qualify as a supervisee under *United States v. Delgado*, 4 F.3d 780, 785 (9th Cir. 1993) *(Delgado)*. *Delgado* establishes that "selling [drugs] to people does not make one an organizer of customers, even wholesale customers, any more than buying from them makes one an organizer of suppliers." *Id.* at 786. The terms "position of organizer" and "a supervisory position" that are found in section 848(c)(2)(A) must be read in the context of the whole provision, which states that the defendant must occupy "a position of organizer, a supervisory position, *or any other position of management.*" 28 U.S.C. § 848(c)(2)(A) (emphasis added). This means that an "organizer" or someone in a "supervisory position" must be in a position of management before the statute applies. "The syntax of the statute, 'A, B, or any other C,' implies that A must fall within the class C; that is, organizers are counted only if they exercise some sort of managerial responsibility." *Delgado*, 4 F.3d at 786.

The government argues that the convictions of Villabona and Bennett should stand because the evidence clearly supports a finding that at least five of the people were in the proper legal relationship of supervisee with

respect to both Villabona and Bennett, and we should presume the jury chose the correct five because it was properly instructed on the law.

[6] The jury was not instructed, however, that individuals qualify as supervisees only if they were those over whom Villabona or Bennett exercised managerial responsibility. It is true that the jury received an instruction that followed the language of section 848(c)(2)(A) – but our interpretation of that statute was not made clear until *Delgado* decided the issue, and *Delgado* was decided after the jury was instructed. If certain individuals were, as a matter of law, incapable of counting as supervisees, the jury needed to be instructed of this.

[7] The problem in this case is not that the jury was presented with more than five individuals, or even that the jury may have chosen different people from the list of potential supervisees to fulfill the role. The problem is that, among the list of people who the jury was told that it could choose, there existed individuals that the jury was not allowed to choose as a matter of law.

The government's contention that we should presume that the jury picked the proper five supervisees has some initial appeal. It is an "almost invariable assumption of the law that jurors follow their instructions. . . . [We] presum[e] that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case . . . and follow the instructions given them." *United States v. Olano*, 113 S. Ct. 1770, 1781 (1993) (citations omitted). But upon closer inspection, this reasoning cannot save the legal error that occurred here.

Griffin v. United States, 112 S. Ct. 466 (1991) *(Griffin)*, illustrates the crucial difference between this case and other cases where we presume that the jury acted in accordance with the law. In *Griffin*, the defendant was convicted of a multiple-object drug conspiracy. The evidence connected Griffin to the first object of the conspiracy but not the second. *Id.* at 468. The jury returned a general verdict of guilty, and Griffin argued that "the general verdict could not stand because it left in doubt whether the jury had convicted her of conspiring to defraud the IRS, for which there was sufficient proof, or of conspiring to defraud the DEA, for which (as the Government concedes) there was not." *Id.* at 468.

The Court rejected this argument. After analyzing the historical practice of allowing a general verdict to stand so long as one count was sufficiently supported by the evidence, the Court examined the relevant caselaw, including *Yates v. United States*, 354 U.S. 298 (1957), and *Turner v. United States*, 396 U.S. 398 (1970) *(Turner)*. *Yates* involved a conspiracy consisting of two objects, one of which was insufficient as a matter of law to support the conspiracy conviction. The Court in *Yates* stated: "In these circumstances we think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." 354 U.S. at 312 (citations omitted). *Yates* expanded prior law, holding that a general verdict must be set aside not only when one of the possible grounds for a conviction was unconstitutional, but also when one possible ground was legally impermissible. *Griffin*, 112 S. Ct. at 472.

The Court in *Griffin* held *Yates* inapplicable to the situation before it. The Court explained that it had never "set aside a general verdict because one of the possible bases of conviction was neither unconstitutional . . . nor even illegal as in *Yates*, but merely unsupported by sufficient evidence." *Id.* Instead, the Court relied on *Turner*, which held that "when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged." *Id.* at 473, *quoting Turner*, 396 U.S. at 420. Because Griffin was charged with two objects of a conspiracy, so long as sufficient evidence of one object existed, the verdict could stand.

Explaining the difference between a conviction based on insufficient evidence, and a conviction based on a legally inadequate theory, *Griffin* illustrated why the line between *Yates* and *Turner* makes good sense.

> Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law – whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors *are* well equipped to analyze the evidence.

Id. at 474 (emphasis in original, citations omitted).

The distinction between *Yates* and *Turner*, made clear in *Griffin*, explains why the government's argument here must fail. Villabona and Bennett are not just contending that the evidence with respect to the list of supervisees is insufficient to support a finding by the jurors that five of them could not have played the requisite role. Rather, they are making the argument that certain persons on the list, given their role, could not have been supervisees of Villabona or Bennett as a matter of law. Based on *Delgado*, certain individuals could not be counted as supervisees, even if the jury made the precise factual findings that the government asked the jurors to make. The government concedes the point. Where the jury is presented with a legally inadequate theory, as opposed to a factually inadequate theory, *Yates* requires that the conviction be vacated and the case retried as to that charge.

[8] Here, we cannot tell whether the jury selected one of the purported supervisees who was actually ineligible under *Delgado*. There were no instructions directing the jury to exclude one who is only a customer. Lacking some assurance that proper differentiation could be made, the verdicts on counts 27 and 28 must be reversed. Thus, we reverse Villabona's and Bennett's convictions for managing a continuing criminal enterprise in violation of 21 U.S.C. § 848, and remand to the district court for a proper adjustment of their sentences and for retrial on the continuing criminal enterprise charges, should the government so choose.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

TANNER, District Judge, concurring.

I concur in the opinion filed today. I write separately, however, to explicitly reject Judge Reinhardt's inference that the makeup of the panel affected the outcome of this case in any way other than in the normal course of the decision-making process that goes into every case heard before this court. Dissent at 6243 ("panel composition, not persuasive legal analysis, has determined the result in this case"). Nothing could be further from the truth.

REINHARDT, Circuit Judge, dissenting.

At a time when other branches of our government are more and more willing to eliminate the constitutional protections provided by the Fourth Amendment, courts should be especially zealous in their efforts to protect individuals from unlawful searches and seizures. *See Murdock v. Stout*, Slip. Op. 93-56248, at 4821 (Noonan, J., dissenting). This precious constitutional guarantee has increasingly come under attack in recent years. Three months ago, the House of Representatives voted 303 to 121 to reject an amendment to the Crime Bill that consisted solely of the precise language of the Fourth Amendment.[1] Certain members of the legal academy are also joining the hue and cry to eliminate the exclusionary rule and to eviscerate the warrant requirement, see Akhil R. Amar, "Fourth Amendment First Principles," 107 *Harv. L. Rev.* 757 (1994), protections that its members once fought to establish and that are so necessary to the effective

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[1] See Katherine Q. Seelye,"House Backs Bill to Require Restitution from Criminals," *N.Y. Times*, Feb. 8, 1995, at A16.

operation of the Fourth Amendment. It is precisely in times like these – when the constitutional rights of individuals are most threatened – that the courts should be vigilant in protecting them.

Instead, this court once again refuses to stand fast against the tide of public opinion and once again fails to act on behalf of the individuals whose rights we are sworn to protect. Once again in our zeal to conduct a war on drugs, the Constitution is the principal victim. Once again, we simply follow the pack instead of standing for constitutional principles.[2] Here, in a few, short, deceptively simple paragraphs, the majority has taken another substantial step toward the elimination of what was once a firmly established constitutional right – the right of American citizens to be free from unreasonable searches conducted by their own government.

This time, the majority holds that for all practical purposes the Fourth Amendment's protections do not extend beyond our borders, and that the only limitations on searches of Americans abroad are those imposed by foreign governments, *even when our government initiates and participates in the search.* Oddly, the majority reaches this erroneous and unfortunate result by first acknowledging what it must – that the Fourth Amendment is applicable to such searches. Opinion at 6219-20, 6223-24. However, it then strips this important principle of all significance by holding that we must look exclusively to *foreign law* when determining whether the search violates the Fourth Amendment. According to the majority, our

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[2] *Cf. Chew v. Gates*, 27 F.3d 1432, 1450-51 (9th Cir. 1994).

government's decision to initiate the search of an American citizen satisfies the requirements of that once powerful Amendment so long as the foreign officials who conduct the search comply with their own laws.[3] Thus, the majority opinion stands for the paradoxical rule that the Fourth Amendment applies to searches of American citizens in which United States agents play a substantial role but that probable cause, the most basic requirement of the Fourth Amendment, does not – except in the unlikely circumstance that the foreign land in which the search is conducted happens to have the identical requirements that our Constitution imposes.

The practical consequences of the majority's opinion can be simply stated. Without the probable cause requirement, the Fourth Amendment is without any real force. Searches of American citizens abroad can be instigated at the will of government agents. Any American traveling outside our nation's boundaries on vacation, business, or just visiting his family, is now fair game for wiretapping, surreptitious searches, and other invasions of privacy *whenever* members of the CIA, the DEA, the FBI, or who knows how many other alphabet law enforcement agencies, so desire.

Moreover, the majority's new rule is contrary to fundamental constitutional principles. The common-sense conclusion that a search of an American citizen cannot be

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[3] In fact, under the majority's view, even that is not necessary, since all that is required to uphold a search is a finding that our law enforcement officials *believed in good faith* that the foreign officials complied with their own law. *See United States v. Peterson*, 812 F.2d 486, 492 (9th Cir. 1987).

instigated by the United States unless it has probable cause to do so is well-supported by existing caselaw, and there is no decision to the contrary. In fact, we need go no further than *Reid v. Covert*, 354 U.S. 1 (1957), and *United States v. Stonehill*, 405 F.2d 738 (9th Cir. 1968), *cert. denied*, 397 U.S. 960 (1969), to understand what is wrong with majority's opinion.

* * *

It is clear, as the majority purports to recognize, that the Fourth Amendment applies to the search at issue. However, while acknowledging that the Fourth Amendment's protections extend to United States citizens abroad, the majority applies the Bill of Rights to foreign searches in a manner that leaves the search and seizure provision without force or effect. In doing so, the majority expressly rejects the noble vision of the Constitution articulated in *Reid v. Covert*, 354 U.S. 1, 5-6 (1957). In the words of the *Reid* plurality:

> At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. *When the government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.* This is not a novel concept. To the contrary, it is as old as government.

Reid, 354 U.S. at 5-6 (plurality opinion).

Indeed, until today, the only circumstance in which we have held that the Fourth Amendment does not apply to a search of a United States citizen conducted abroad is when the United States is not involved in the search. *United States v. Stonehill*, 405 F.2d 738, 753 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969). *Stonehill* explicitly held that the Fourth Amendment applies to a search by foreign officials when the participation of the United States government is sufficiently substantial to render a search or seizure a joint venture between the United States and the foreign government. *Stonehill*, 405 F.2d at 743. That is, as the majority correctly rules, the type of search involved here.

Recognizing that existing precedent compels the conclusion that the Fourth Amendment is applicable, the majority addresses the question whether the search at issue violated the requirements of the Amendment. Here it commits a fundamental error. It holds that in all cases involving joint-venture searches of Americans abroad the lawfulness of the search, for Fourth Amendment purposes, depends entirely upon the vagaries of foreign law.[4]

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[4] The majority's effort to respond to this point, Opinion at 6213-17 n.1, is wholly unavailing. Rather than pointing to any *Fourth Amendment* protection its decision affords to American citizens abroad, the majority can only point to a protection afforded by the *Fifth Amendment*. *See United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1245 (Wallace, J., dissenting) (an individual "may invoke the fifth amendment to challenge the admission of evidence that was obtained through means that 'shock the conscience'. . . . "). In fact, by explaining that the courts can exercise their supervisory powers to prevent the United States from initiating a search that "shocks the conscience," the majority implicitly acknowledges that, under its

Put simply, what the majority holds is that the only Fourth Amendment protections United States citizens who travel abroad enjoy vis-a-vis the United States government are those safeguards, if any, afforded by the laws of the foreign nations they visit. Under the majority's holding, the Fourth Amendment's requirements are wholly redundant since they provide nothing more than is already provided by foreign law. In fact, under the majority's rule, the Fourth Amendment provides *even less* protection than foreign law since, according to the principal case on which the majority relies, the Constitution does not even require foreign officials to comply with their own law; all that is required is that American officials have a good faith belief that they did so. *See Peterson*, 812 F.2d at 49. Thus, even though the majority concedes that the Fourth Amendment applies to joint-venture searches like the one before us, it holds that when Americans enter Iraq, Iran, Singapore, Kuwait, China, or other similarly inclined foreign lands, they can

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view, the Fourth Amendment provides absolutely no protection to United States citizens traveling in foreign lands. Until this decision, the Fourth Amendment protected *all* citizens from intrusive searches and seizures initiated by our government without probable cause even when they did not shock the conscience. However, under the majority's view, American citizens traveling abroad no longer enjoy this important guarantee; the state can needlessly and arbitrarily subject American citizens to intrusive searches and seizures of every type without providing any justification for doing so as long as they do not rise to such an extreme as to shock the conscience. I note that the majority has not cited a single case in which a court has held that a search or seizure "shocks the conscience." *But cf. Rochin v. California*, 342 U.S. 165 (1952). This is hardly surprising. *See Mapp v. Ohio*, 367 U.S. 643 (1961).

be treated by the United States government exactly the way those foreign nations treat their own citizens – at least for Fourth Amendment purposes.

The facts of this case exemplify the disastrous consequences of the majority's holding and the extent to which the opinion strips our citizens of fundamental safeguards against arbitrary invasions of their privacy by their own government. Here, the government does not contend that it had probable cause to obtain a court order permitting the interception of the phone calls of the defendants. Thus, had the defendants remained in this country, the government could not have tapped their telephones.[5] What the government did was to wait until they crossed the border. It then requested officials of another country, Denmark, which had at best an attenuated interest in the matter,[6] to act as agents for the United States and to tap

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[5] Actually, what is needed to obtain a court order for a domestic wiretap is far more than the probable cause mandated by the Fourth Amendment. *See* 18 U.S.C. § 2518. However, for purposes of this dissent, it is necessary to consider only the government's failure to meet the probable cause standard.

[6] The search was conducted entirely at the behest of the United States government and entirely for the benefit of American agents. Denmark had no direct or substantial interest in tapping the defendants' telephones. To the contrary, the only information provided to its officials by the United States government made clear that the drug transactions in question were occurring thousands of miles away. Although in determining whether the telephones could be tapped the Danish court found that the defendants' conduct was punishable by up to six years in prison, there is no evidence that the Danish government ever intended to investigate the defendants for violations of Danish law, to prosecute the defendants for any violation of law, or to use the fruits of the wiretaps for either of those purposes.

the telephones of American citizens. By doing so, the government arbitrarily exercised its power over the defendants free of the constitutional constraints that the Bill of Rights imposes.[7] The majority's failure to require our government to have probable cause to initiate this search makes clear that its "application" of the Fourth Amendment to this case serves only to perpetuate a myth, if not a fraud, upon the public when it represents that the Fourth Amendment applies to Americans abroad and that it provides Americans with meaningful protection outside our borders. Certainly, that will no longer be the case if the majority opinion is allowed to stand.

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Probable cause is the fundamental requirement[8] that must be satisfied before our government can initiate

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[7] Denmark only requires that the government have "weighty reasons" to conclude that a search will produce evidence that those under investigation have engaged in a particular offense. Although we have no way of giving content to what is a meaningless phrase in our own legal system, it is clear from the facts of this case that the Danish standard falls far short of our own probable cause requirement.

[8] I had mistakenly believed that it was unnecessary to provide a citation for a contention as fundamental as that set forth in the text. However, the majority suggests that my failure to cite a case indicates that I alone subscribe to the belief that probable cause is a basic requirement of the Fourth Amendment. To the contrary, I merely follow the lead of the Supreme Court, which has repeatedly stated:

> In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a *minimum* requirement for a reasonable search permitted by the Constitution.

searches in criminal investigations. *See Camara v. Municipal Court*, 398 U.S. 525, 535 (1967) ("in a criminal investigation . . . a search for [contraband] goods, even with a

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Chambers v. Moreny, 399 U.S. 42, 51 (1970) (emphasis added); *see also Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (same). Similarly, in *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985), the case upon which the majority so heavily relies, the Court emphasized that "*[o]rdinarily*, a search . . . must be based upon 'probable cause' to believe that a violation of the law has occurred." *T.L.O.*, 469 U.S. at 340.

The majority is, of course, correct that in certain limited, narrowly defined cases, the Court has not required the government to have probable cause to conduct a search. In each of these cases, however, the Court both acknowledged that the Fourth Amendment generally requires probable cause to conduct a search and found unusual or exceptional circumstances which justified a departure from the general rule. *See, e.g., T.L.O*, 469 U.S. at 341.

Here, in contrast, as I have repeatedly pointed out in the text of my dissent, the majority has provided absolutely no justification for abandoning this basic requirement. It does not explain, for example, why the nature of a foreign search precludes us from applying the probable cause standard to such a search. While there may be good reason to dispense with the warrant requirement abroad, there appears to be no plausible justification – and the majority certainly has not provided one – for concluding that an American agent who requests that a search be conducted cannot be asked to explain the basis for his request at the time of the subsequent criminal proceeding in federal court. *See infra* text accompanying notes 8-9 (discussing this issue in greater detail). The obligation imposed on the government would be precisely the same as is imposed in the case of domestic searches.

More important, the majority does not carve out a *narrow* exception to the general rule that the government must have probable cause to initiate a search of one of its own citizens. All

warrant, is 'reasonable' only when there is 'probable cause' " to conduct it). The majority has provided no

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of the cases cited by the majority concern narrow, carefully defined exceptions to the general probable cause requirement. For example, *Terry v. Ohio*, 392 U.S. 1 (1968), on which the majority so heavily relies, merely allows the police to conduct short, non-intrusive investigations without probable cause so long as they have a reasonable suspicion that the stop is necessary. Here, in sharp contrast, the majority has held that *every* foreign search, regardless of its level of intrusiveness or the circumstances surrounding the decision to initiate it, may be conducted without probable cause under the Fourth Amendment. Elementary respect for the dictates of the Fourth Amendment should preclude such an unwarranted extension.

Finally, I must vigorously disagree with the majority's attempt to assert that the probable cause standard is part of the warrant requirement only and that the standard therefore need not be met whenever a warrant is not required. *See* Opinion at 6213-17 n.1. Both the Supreme Court and our circuit have often conditioned the admission of evidence obtained through a warrantless search upon the existence of probable cause for that search. *See, e.g., California v. Acevedo*, 111 S. Ct. 1981 (1991); *United States v. Ross*, 465 U.S. 798 (1982); *Hopkins v. City of Sierra Vista*, 931 F.2d 524 (9th Cir. 1991); United States v. Sarkissian, 841 F.2d 959 (9th Cir. 1988). Indeed, the case upon which the majority relies, *T.L.O.*, makes clear how revisionary and unprecedented is the majority's attempt to jettison the probable cause requirement with regard to all warrantless searches: "[o]rdinarily, a search – *even one that may permissibly be carried out without a warrant* – must be based upon 'probable cause'. . . . " *T.L.O.*, 469 U.S. at 340 (emphasis added); *see also Id.* (" 'the concept of probable cause . . . bear[s] on the reasonableness of a search' "). I am in fact simply unable to comprehend how the majority can purport to separate the reasonableness requirement and the probable cause requirement in this case in light of the Supreme Court's explicit holding that "in a criminal investigation . . . a search for [contraband] goods, *even with a warrant*, is 'reasonable' only when there is 'probable cause' to believe that

reasonable explanation for its ruling that that requirement need not be met here, despite the Supreme Court's clear indication that it must do so in order to depart from the general rule that probable cause must exist for a search to be conducted. *See, e.g., T.L.O.*, 469 U.S. at 341; *see also supra* note 8. There is, of course, an obvious explanation for the majority's failure even to attempt to explain its departure in this case: there is simply no convincing justification that can be offered for abandoning the probable cause requirement with regard to foreign searches. While there may be good reason to abandon the *warrant* requirement abroad, there is *no* reason that, in a criminal case conducted in the United States, a federal judge cannot require a United States agent to explain after the fact why he initiated a search of one of our own citizens. Because judicial scrutiny of the search will always take place *after* it has been conducted, there is no conceivable way that imposing such a requirement would hinder law enforcement efforts abroad – except to the extent that those efforts violate our own Constitution.

One of the reasons that the majority errs so egregiously in this case is that it fails to recognize the difference between the questions whether there is enough reason to justify a search and what procedures must be followed thereafter. The difference is critical, and entirely different rules apply to the two inquiries. The reason for applying different rules is evident: the probable cause

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they will be uncovered in a particular dwelling." *Camara v. Municipal Court*, 387 U.S. 523, 535 (1967) (emphasis added); *see also infra* note 9 (quoting Justice Blackmun, who reaches the same conclusion).

inquiry determines whether the United States has the right to request the search in the first place; that inquiry relates solely to a covenant between the United States and its people which has nothing to do with the foreign government involved. The foreign law inquiry, in contrast, determines essentially whether the foreign officials acted lawfully after they received a request to conduct a search – that is, whether they adhered to their own standards and practices in implementing the request of the United States.[9] The latter inquiry directly implicates the

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[9] The question of whether a warrant is required to conduct a joint-venture foreign search is determined by foreign law standards since it is intimately connected with the manner in which the search is carried out. As Justice Kennedy, the author of the *Peterson* opinion, observed:

> The absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the Fourth Amendment's warrant requirement should not apply[abroad] as it does in this country.

United States v. Verdugo, 494 U.S. 259, 278 (Kennedy, J., concurring); *see also id.* at 279 (Stevens, J., concurring) (explaining that the warrant requirement is inapplicable abroad). Similarly, Justice Blackmun has observed:

> I agree with the Government . . . that an American magistrate's lack of power to authorize a search abroad renders the Warrant Clause inapplicable to the search of a noncitizen's residence outside this country.
>
> The Fourth Amendment nevertheless requires that the search be "reasonable." And when the purpose of a search is the procurement of evidence for a criminal prosecution, we have consistently held that

interests and concerns of the foreign nation involved.[10] Thus, the former inquiry, quite naturally, depends upon our law, while the latter is appropriately governed primarily by foreign law.

In place of reasoned analysis and a persuasive explanation for its decision, the majority relies wholly upon our decision in *United States v. Peterson*, 812 F.2d 486 (9th Cir. 1987). *Peterson*, however, does not support the majority's conclusions. To the contrary, *Peterson* is entirely consistent with the view that the majority rejects – that the Fourth Amendment has independent force abroad and affords American citizens at least some substantial protections against intrusions by their own government. *Peterson* concerned the question whether the search was carried out properly by foreign officials, including the question whether a warrant should have been obtained,

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> the search, to be reasonable, *must be based upon probable cause.*

Id. at 297-98 (Blackmun, J., dissenting) (emphasis added). The use of the term "*non*citizen" by Justice Blackmun was descriptive rather than limiting and is solely a consequence of the fact that the petitioner in that case was in fact a noncitizen. The four justices, other than Justice Kennedy, who formed the majority agreed that the warrant requirement is inapplicable for a somewhat different reason. They said that a warrant obtained in the United States would be a "dead letter" overseas. *Verdugo*, 494 U.S. at 275.

[10] Moreover, from a practical standpoint, it would be most difficult to ensure that foreign police officials understood and followed our Fourth Amendment rules and procedure, and since we cannot in any event expect them to conduct searches involving our citizens in a different manner than they conduct searches of all other persons.

not the question of what standards should apply in determining whether the United States government lawfully requested the search in the first place.[11] *Peterson* never discusses the critical question of whether American officials must have *probable cause* for inducing a foreign government to carry out a search. In fact, there is no indication in the opinion that any such issue was ever raised before the court. Moreover, *Peterson* makes clear that when foreign law is relevant, it represents only one part of our inquiry into the constitutionality of the search. In the words of the court, when the United States undertakes a joint venture search with foreign officials, "the law of the foreign country must be consulted at the outset as *part* of the determination whether or not the search was reasonable." *Peterson*, 812 F.2d at 490 (emphasis added). In fact, the *Peterson* court repeatedly emphasized that the law of the foreign country represented only "part of the analysis." *Id.* at 492 (emphasis added); *see also id.* at 490 ("The law of the foreign country must be consulted . . . as *part* of the determination."). Thus, the case upon which the majority so heavily relies in adopting its novel rule neither considers nor addresses the issue before us – whether probable cause is required for foreign searches; it does not, contrary to what the majority holds, state that we must look exclusively to foreign law; and, ironically, it is a case that the author of the majority opinion has previously conceded provides, *at best*,

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[11] As described in note 10, the *Peterson* author, Justice Kennedy, after joining the Court's decision in *Verdugo*, explained why the question of whether a warrant must be obtained falls in the first category of questions.

"implicit" support for his views. *See United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1249 (9th Cir. 1988) (Wallace, J., dissenting).[12]

* * *

Next, I must express my strong disagreement with the method of legal analysis employed by the majority in this case. The majority, relying on *Peterson*, a case that does not even involve the question of probable cause,[13] reaches its decision as if the law in this area were well established and as if there were no arguments to be made in favor of the defendants' position. However, as the majority is well aware, in an earlier opinion authored by Judge Thompson, *United States v. Verdugo-Urquidez*, 856

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[12] The majority's continued adherence to its claim that *Peterson* compels the result in this case is quite surprising. The majority has apparently conceded, as it must, that Peterson does not address whether probable cause must exist for the United States to initiate a search of American citizens abroad. *See* Opinion at 6213-17 n.1. The majority cannot point to anything in *Peterson* that directly contradicts my interpretation of the decision, and the author of the majority opinion has already conceded that *Peterson* provides only indirect support for his contentions. *See text supra*. At best, the majority has suggested that there are at least two plausible readings of *Peterson* which support two entirely different results. In such a case, I believe that it is incumbent upon a court to acknowledge the lack of precedent for its holding and to provide cogent, developed reasoning for its conclusion; the parties deserve more than a few conclusory paragraphs accompanied by citations to a case that does not compel the result reached by the court.

[13] Indeed, *Peterson's* only mention of the phrase "probable cause" takes place later in the opinion, when it discusses the defendants' arguments regarding an entirely separate search, one that took place on the high seas. *Peterson*, 812 F.2d at 493-94.

F.2d 1214 (9th Cir. 1988), the court held that the Fourth Amendment applies to searches conducted by a foreign government acting in conjunction with the United States and that when the United States participates in a foreign search probable cause must exist.

By contrast with the majority's opinion here, the *Verdugo* majority provided a well-reasoned and well-researched justification for its decision. It explored extensively the historical and legal basis for applying the Fourth Amendment to actions that our government undertakes in foreign lands. Although the Supreme Court reversed Judge Thompson's opinion on the ground that *citizens of foreign nations* are not entitled to Fourth Amendment protections during foreign searches, it left the part of the *Verdugo* analysis relevant to this case undisturbed. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). Specifically, the Court did *not* conclude that American citizens forfeit Fourth Amendment protections by going abroad; nor did it state that they are entitled only to the privileges afforded them by foreign law. There would in fact have been no reason for it to consider those questions.[14]

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[14] The majority is plainly wrong when it contends that the Court "expressly rejected" the view that probable cause is necessary for a search of American citizens initiated by the United States. The sole support that the majority provides for this wholly unwarranted conclusion is a short passage in *Verdugo* that does nothing more than describe our own court's erroneous conclusion that the United States must obtain a warrant to conduct a search of a *noncitizen* in a foreign country. As is made clear from the Court's statement a few sentences earlier, this passage is only included to demonstrate that this circuit erred in ignoring "the problems attending the application of the Fourth

We have recognized that, even though a case has been vacated, as *Verdugo* subsequently was, *United States v. Verdugo-Urquidez*, 902 F.2d 773, 774 (9th Cir. 1990), it still provides persuasive authority within the circuit if its reasoning is unaffected by the decision to vacate. *See Orhorhaghe v. I.N.S.*, 38 F.3d 488, 493 n.4 (9th Cir. 1994).

Amendment *to aliens." Verdugo*, 494 U.S. at 274 (emphasis added). The passage solely concerns the Court's holding that the Fourth Amendment does not protect *noncitizens* from searches and seizures conducted by the United States abroad. The paragraph makes no mention of whether probable cause is required for searches of *citizens*. Thus, I simply cannot comprehend why the majority chooses to imply that, after devoting many pages to a detailed analysis of the Fourth Amendment's application to searches and seizures of noncitizens abroad, the Court would address the issue of the rights of American citizens in such an offhanded manner. Surely the majority does not believe that the Supreme Court would decide so important an issue without even acknowledging that it was doing so – particularly when that issue was entirely unnecessary to the resolution of the case before it.

More important, Justice Kennedy's concurring opinion in *Verdugo* makes it clear that the majority's contention that the Supreme Court rejected my approach and adopted Chief Judge Wallace's is simply wrong. In casting the fifth and decisive vote for the *Verdugo* opinion, Justice Kennedy explicitly observed that "[t]he rights of a *citizen*, as to whom the United States has continuing obligations, are not presented by this case." *Verdugo*, 494 U.S. at 278 (emphasis added); *see also Verdugo*, 494 U.S. at 279 (Stevens, J., concurring in the judgment) (concluding that the warrant requirement does not apply "to searches of *noncitizens'* homes in foreign jurisdictions" (emphasis added)). Given that the Court clearly never addressed the appropriate treatment of a Fourth Amendment claim by a *citizen* travelling abroad, I must most forcefully disagree with the majority's contention that the *Verdugo* decision forecloses the analysis I have afforded in my dissent.

Such is, of course, the case with respect to the reasoning in *Verdugo* that is relevant here.

The majority deliberately ignores the reasoning in *Verdugo* that demonstrates the fallacy of its position. It offers no justification for concluding, contrary to *Verdugo*, that the probable cause requirement becomes "inoperative" when the government acts abroad, nor can it point to any development in the law that would require us to alter our *Verdugo* analysis. The majority's cavalier treatment of a well-reasoned explication by this court concerning the question before us suggests that panel composition, not persuasive legal analysis, has determined the result in this case. The government here was simply fortunate enough to draw a panel led by the dissenter in *Verdugo* and including another judge who agreed with his position.[15]

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[15] By referring to panel composition, I do not of course question in any way the method used for selecting the panel. *See* Opinion at 6213-17 n.1 (citing the Rules of the United States Court of Appeals for the Ninth Circuit). Nor do I question the ability or legitimacy of either of my two esteemed colleagues. My reference to panel composition is plainly and simply a statement of an obvious fact. The result we reach here would indeed have been different if the panel that previously considered the question of foreign searches had been drawn to hear this case. Judges with different views or understandings of the Constitution regularly reach different results in cases presenting constitutional questions. That, however, is no excuse for failing to consider or discuss our earlier well-reasoned analysis. The explanation that the majority offers in its footnote replying to this dissent, *see* Opinion at 6213-17 n.1, is wholly unpersuasive. *See supra* note 14. In fact, the explanation serves only to confirm that there is no sound basis in law for the majority's failure to analyze the relevant legal authorities properly.

The government's good fortune is the nation's misfortune. The majority has improperly and severely limited one of the most important protections provided by our Constitution and has undermined one of its fundamental tenets. My colleagues' failure to address the persuasive authority of *Verdugo* only highlights the fact that they lack any reasonable or reasoned justification for their decision today.

* * *

Early in this century, the Supreme Court warned that courts "must be vigilant to scrutinize the attendant facts [surrounding a search] with an eye to detect and a hand to prevent violations of the Constitution by circuitous and indirect methods." *Byars v. United States*, 273 U.S. 28, 33 (1927). In our leading case involving foreign searches initiated by the United States government, this court warned that "[a] federal agent must not be permitted to do indirectly that which he cannot do directly, and thus circumvent the provisions of the Fourth Amendment against unreasonable search and seizure." *Stonehill*, 405 F.2d at 746. The majority's failure to heed these warnings ensures that when, as here, the United States government is unable to obtain a search warrant because it lacks probable cause, it can simply wait until a suspect goes abroad and then instruct a friendly or submissive foreign government to conduct the search on its behalf. Thus, the government is now free to conduct foreign searches in a manner that circumvents the requirements of the Constitution and to achieve indirectly what it cannot achieve directly. Even more important, the majority's decision drives one more nail in the coffin of the Fourth Amendment, and leaves all Americans with less protection

against arbitrary governmental actions than they enjoyed before the majority spoke.

For these reasons, although I fully concur in Parts I and III of the opinion, I dissent from Part II.

APPENDIX B

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED JUNE 6, 1995

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, -vs- MARIA CECILIA BARONA, Defendant-Appellant.	No. 90-50519 D.C. No. CR-88-0972-WJR-3
UNITED STATES OF AMERICA, Plaintiff-Appellee, -vs- JANET MARTINEZ, aka: LUZ JANET MARTINEZ & LUZ JANETH MARTINEZ, Defendant-Appellant.	No. 90-50536 D.C. No. CR-88-0972-WJR-4
UNITED STATES OF AMERICA, Plaintiff-Appellee, -vs- BRIAN BENNETT, Defendant-Appellant.	No. 90-50686 D.C. No. CR-88-0972-WJR-2

UNITED STATES OF AMERICA, Plaintiff-Appellee, -vs- MARIO ERNESTO VILLABONA-ALVARADO, a/k/a Tico, Defendant-Appellant.	No. 90-50687 D.C. No. CR-88-0972-WJR-1
UNITED STATES OF AMERICA, Plaintiff-Appellee, -vs- MICHAEL DUBARRY McCARVER, a/k/a Mike Bald, Defendant-Appellant.	No. 90-50691 D.C. No. CR-88-0972-WJR-7
UNITED STATES OF AMERICA, Plaintiff-Appellee, -vs- MICHAEL HARRIS, a/k/a Tall Make, Defendant-Appellant.	No. 90-50694 D.C. No. CR-88-0972-WJR-6 MEMORANDUM (Filed Jun. 6, 1995)

Appeal from the United States District Court
for the Central District of California
William J. Rea, District Judge, Presiding
Argued and Submitted October 5, 1994
Pasadena, California

Before: WALLACE, Chief Judge, REINHARDT, Circuit Judge, and TANNER,* District Judge.

Six appellants, Barona, Martinez, McCarver, Harris, Villabona, and Bennett, were convicted of drug-related crimes. This disposition resolves most of the claims raised on appeal. Those issues not addressed are discussed in *United States v. Barona*, Nos. 90-50519, 90-50536, 90-50686, 90-50687, 90-50691, and 90-50694, slip op. 6205 (9th Cir. June 6, 1995) (*Barona*), which arises out of the same appeals. The district court had jurisdiction under 18 U.S.C. § 3231. We have jurisdiction to hear this timely appeal pursuant to 28 U.S.C. § 1291.

I

The first issue raised by the appellants is whether the district court should have severed their trial. The abuse of discretion standard governs our determination of the district court's severance ruling. *United States v. Baker*, 10 F.3d 1374, 1386 (9th Cir. 1993) (*Baker*), *cert. denied*, 115 S. Ct. 330 (1994). Because the district court has broad discretion to deny motions for severance under Federal Rule of Criminal Procedure 14, and because Federal Rule of Criminal Procedure 8(b) specifically allows joinder of

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*Honorable Jack E. Tanner, United States District Judge, Western District of Washington, sitting by designation.

defendants where they participated in the same acts or transactions, we ask "whether a joint trial was so manifestly prejudicial as to require the trial judge to exercise his discretion in but one way, by ordering a separate trial." *United States v. Patterson*, 819 F.2d 1495, 1501 (9th Cir. 1987), *quoting United States v. Abushi*, 682 F.2d 1289, 1296 (9th Cir. 1982). Among other things, we consider: (1) judicial economy, (2) convenience to witnesses, (3) the avoidance of delay, (4) whether there are inconsistent defenses being raised, (5) whether the jury will be able to compartmentalize and appraise the independent evidence against each defendant, (6) whether the confrontation rights of a defendant are compromised, (7) whether exculpatory evidence would be unavailable in a joint trial, and (8) whether the trial would be excessively long. *Baker*, 10 F.3d at 1386-92. So long as "the jury may reasonably be expected to collate and appraise the independent evidence against each defendant" there is no prejudice. *Id.* at 1387. "The best evidence of the jury's ability to compartmentalize the evidence is its failure to convict all defendants on all counts." *Id.*

In this case, Villabona was acquitted of several charges (counts 6, 10, and 11) and no verdict was reached on count 9. Furthermore, the facts demonstrate that Barona and Martinez were part of the whole conspiracy, and repeatedly spoke with the alleged co-conspirators about the matters charged. In *Baker*, we upheld the district court's refusal to sever the trial of defendant Cole, even though Cole was charged with one count, and there were 24 defendants in a 44 count indictment, resulting in a 16

month trial. *Id.* at 1391. Each of the appellants' involvement here was more extensive that [sic] Cole's. The trial evidence against each appellant would have been largely cumulative. Separate trials would have been uneconomical. The district judge found that each defendant could receive a fair trial. We conclude that the district judge did not abuse his discretion by trying all of the appellants together.

II

A second issue raised concerns only Barona and Martinez, who argue that their sentence should be reduced based on their role and culpability in the conspiracy. We review for clear error, and observe that a "sentencing judge is in a unique position to evaluate the defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review." *See* U.S.S.G. § 3E1.1 (comment 5).

Barona contends that she "accepted responsibility" for her crime in accordance with section 3E1.1 of the Guidelines, and that she played a "minor role" in the conspiracy, as defined by section 3B1.2 of the Guidelines. We conclude that the district judge did not clearly err by failing to reduce Barona's sentence under the Guidelines. It is only in "rare cases" that a defendant, once convicted at trial, can demonstrate the requisite acceptance of responsibility. U.S.S.G. § 3E1.1. Only "pre-trial statements and conduct" are to be considered. *See id.* (comment 2). The only evidence of an "acceptance" in Barona's case is a letter, submitted to the court *in camera*, two months *after* her conviction, and a statement by Barona at sentencing

that she was "very sorry." The district court refused to accept or read the letter; there is no provision allowing the district court to consider the letter without disclosing it to the government. Because Barona did not want the letter disclosed, the district court refused to consider it. Furthermore, even if the district court should have read the letter, it would not constitute acceptance of responsibility under section 3E1.1, because the letter was submitted well after Barona's conviction.

Barona also argues that she was a "minor participant" in the crime under section 3B1.2. That section is "used infrequently and only in exceptional circumstances." *See United States v. Davis*, 36 F.3d 1424, 1436 (9th Cir. 1994). A downward departure of a sentence under this section is not required when the defendant shows that he or she was the "least significant" player – what is required "is that he [or she] be a minimal or minor participant." *See United States v. Rexford*, 903 F.2d 1280, 1283 (9th Cir. 1990). The district court found that Barona's "role throughout this entire case has been a major one and has been a long-term one, and it has shown that she has a position of great responsibility for . . . the distribution of the cocaine and the collection of the money." This finding is not clearly erroneous.

Martinez also contends that she was a "minor participant," and that an adjustment downward in her sentence is authorized under U.S.S.G. § 3B1.2. The judge at sentencing said that the presentence report "indicates that the defendant is felt to be one of the more culpable of the defendants in terms of relative culpability." This finding is not clearly erroneous. The district judge found that

"under the circumstances, the totality of the circumstances, the severity of the offenses for which she has been convicted warrants the upper range of the sentencing guidelines range of 188 to 235 months." This sentence was within guideline range.

III

The next issue raised was whether the district court properly determined the validity of a domestic wiretap application. The domestic wiretap evidence, consisting of four different taps on five mobile telephones, implicates Martinez, Barona, Bennett, McCarver, and Villabona. The wiretaps (granted on September 23, October 18, October 31, and November 10, 1988) were for 30 day periods. The main argument is that the wiretap inception orders were inadequate because the investigating officers failed to satisfy the "necessity" requirements of 18 U.S.C. § 2518(3)(c).

Section 2518(3)(c) requires the judge to determine, before a wiretap is authorized, that "normal investigative procedures" have been tried and have failed, or that such procedures appear unlikely to succeed if tried or are too dangerous. The district judge has discretion when determining the necessity of a wiretap. *See United States v. Brone*, 792 F.2d 1504 (9th Cir. 1986). The affidavit must "set out a factual background that shows that ordinary investigative procedures, employed in good faith, would likely be ineffective in the particular case." *Id.* at 1506. Failure to satisfy the necessity requirement can result in suppression. *United States v. Ippolito*, 774 F.2d 1482 (9th Cir. 1985).

United States Special Agent John Comer submitted a lengthy (84 page) affidavit, dated September 23, 1988, that detailed the information the government had on Villabona, Bennett, McCarver, Barona, and Martinez and documented all of their movements through September of 1988. This affidavit served as a basis for all of the domestic wiretaps, as each subsequent affidavit also incorporated the factual specificity of the September 23, 1988, affidavit. Agent Comer's affidavit also outlined why mobile telephone conversations were suspected to link the various participants in the conspiracy. The pattern of numbers being called – and the frequency with which they were being called – suggested that certain mobile telephones were being used for illegal activity. The Comer affidavit also set forth the investigative techniques that had been tried and had failed, and the techniques not likely to succeed. These included informants and confidential sources, the use of undercover agents, physical surveillance, aerial surveillance, pen registers, grand jury investigation, search warrants, suspect interviews, and trash searches. This is not a case, as in *United States v. Kalustian*, 529 F.2d 585, 589 (9th Cir. 1975), where the government was seeking a wiretap merely because the case was "tough to crack." Agent Comer set forth specific facts and discussed why alternate methods had either failed or were reasonably likely to fail. Given the extensive amount of previous surveillance, the inability of pen registers to identify the parties, and the normal investigative procedures utilized up until September 1988, the district court did not abuse its discretion when it authorized each of the domestic wiretaps.

IV

Several of the appellants argue that prejudicial or irrelevant evidence was admitted against him or her. We review for an abuse of discretion whether evidence was prejudicial or relevant. *United States v. Daly*, 974 F.2d 1215, 1216-17 (9th Cir. 1992). We review de novo the construction of the Federal Rules of Evidence. *United States v. Diaz*, 961 F.2d 1417, 1419 (9th Cir. 1992).

Martinez argues that many tape conversations had no relation to her and were highly prejudicial because they created a spillover effect. But this contention goes to whether a severance should have been granted.

Martinez also argues that the tape recorded conversations of others were hearsay under Rule 801 of the Federal Rules of Evidence. But "acts and statements of co-conspirators are admissible against other conspirators." *United States v. Lothian*, 976 F.2d 1257, 1262 (9th Cir. 1992). Evidence that was properly admitted linked Martinez to the conspiracy by showing that (1) Martinez discussed with Villabona a 300 kilogram delivery on December 9, 1987, (2) Martinez delivered 320 kilograms of cocaine to Harris, and (3) Martinez was told in March 1988, to look for a supply source in Columbia. Any improperly admitted evidence was harmless. *See United States v. Attardi*, 796 F.2d 257, 260 (9th Cir. 1986).

Martinez further argues that testimony of government witnesses Ilse Rubio, an employee of Costa Azul Travel Agency who identified Martinez's voice, and Haracio Marco, an undercover police officer whose testimony linked "Operation Pisces" with other appellants, was prejudicial and irrelevant. Rubio's testimony was

clearly relevant, as it tended to show Martinez had incriminating conversations with co-conspirators. Cross-examination was allowed. Marco's testimony was probative of the fact that Gomez, a drug dealer, was known to Martinez (Gomez's telephone number was in Martinez's 1986 telephone book). Villabona was connected with both Gomez and Rios, and Villabona told Martinez to talk to Rios to secure additional sources of cocaine. Therefore, the connection between Villabona, Gomez, and Rios was relevant to show that Martinez understood Villabona's instructions.

Bennett contends that papers and documents seized from his hotel room in Denmark should be suppressed. However, none of these notes were introduced at trial and Bennett has not alleged what evidence, if any, resulted from these notes. He did not even raise this argument during trial. There was no showing of improper use of these notes.

Bennett also maintains that evidence from 13 searches conducted pursuant to a warrant based upon an affidavit of Deputy John Edner should be suppressed. However, no evidence from these searches was admitted at trial either, and Bennett did not specify any other evidence that resulted from these searches.

Villabona argues the relevancy of evidence admitted against him, as well as the introduction of certain ledgers obtained during searches. Villabona's main evidence arguments are that evidence of a June 1, 1988, seizure of $6.8 million in drug money (the "Lori Street Incident"), evidence from "Operation Pisces," and evidence of a November 6, 1988, seizure of 502 kilograms of cocaine

were improperly admitted and unfairly prejudiced him, because the government could not link Villabona to those events.

Operation Pisces resulted in the arrest of Leonardo Gomez (aka Santiago or Loquillo), as well as "Zapata," a dealer in Central America. Gomez was arrested on May 6, 1987. When Zapata was arrested in Central America, a ledger was obtained that documented two money deliveries made by Gomez. Not only was Gomez arrested in Villabona's house, but in March 1987, after the first delivery of money, Gomez and Rios drove to Villabona's residence. Villabona also told Martinez at one point to ask Rios to be an additional cocaine source. The evidence showed a clear connection between Villabona, Gomez, Rios, Martinez, and Zapata. The district judge did not abuse his discretion when he admitted this evidence.

Regarding the "Lori Street Incident," the government introduced evidence that $6.8 million was seized from a residence that was identified through conversations Villabona had with someone called "Santos." The defense argued that Villabona's conversations did not show that the numbers discussed in Villabona's conversations related to money. The seizure of the large amount of money and of a ledger that referred to Santos showed that Santos's business related to large amounts of drug money, and that the residence was used for drug activity. The evidence of the seizure was relevant to show that Villabona was discussing drugs and drug money. *See United States v. Jaramillo-Suarez*, 950 F.2d 1378, 1383 (9th Cir. 1991) (drug-related documents "may properly be admitted to prove the character and use of the place where found").

Finally, we consider the 502 kilograms of cocaine that a Missouri state trooper found in a vehicle driven by Childress and James McCarns. The record supports Villabona's knowledge and involvement in this incident. Villabona spoke with Stanley McCarns about talking to Bennett in order to get a lawyer for James McCarns. Villabona ultimately did speak to Bennett about James McCarns, and Bennett informed Villabona that 200 kilograms (a "$2 phone bill") of cocaine that was left in James McCarns's apartment had been picked up. The other evidence that Villabona contests relates to charges for which Villabona was ultimately acquitted, and, therefore, do not require our review.

V

In addition to their evidentiary contentions, several appellants assert that the evidence against him or her was insufficient. Bennett's and Villabona's continuing criminal enterprise (CCE) convictions (counts 27 and 28) under 21 U.S.C. § 848 are discussed in *Barona*, slip op. at ___. We now discuss the other counts.

When reviewing for insufficient evidence, we view the evidence in the light most favorable to the prosecution and determine if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *United States v. Bishop*, 959 F.2d 820, 829 (9th Cir. 1992).

Barona was charged with and convicted of counts 1-5, which included conspiracy (18 U.S.C. § 846), possession of cocaine with intent to distribute on three different occasions (21 U.S.C. § 841(a)(1); 18 U.S.C. § 2), and aiding

or abetting the possession of an additional 502 kilograms of cocaine with intent to distribute (21 U.S.C. § 841(a)(1); 18 U.S.C. § 2).

Barona discussed with both Villabona and Bennett the arrival of drugs and drug money on several occasions. Barona delivered drugs at Villabona's request. There was a definite agreement to engage in criminal activity and the requisite intent, as well as overt acts in furtherance of that agreement to distribute large quantities of drugs and cash. These are the elements of conspiracy. *See United States v. Litteral*, 910 F.2d 547, 550 (9th Cir. 1990). The evidence also showed that on three separate occasions in December 1987, Barona spoke with Villabona and Bennett about delivering drugs and collecting money (supporting counts 2-4). The evidence linking Barona to count 5 was also sufficient. Count 5 charged Barona with aiding and abetting in the possession of 502 kilograms of cocaine – the amount seized on November 6, 1988, when James McCarns and Childress were arrested in Missouri. Bennett had contacted Stanley McCarns to arrange for transportation of cocaine from Los Angeles to Detroit. Ongoing shipments of drugs from Los Angeles were bound for Detroit. Not only was Barona a member of the conspiracy, but she was in Detroit awaiting deliveries from Los Angeles. On November 16, 1988, Barona was contacted by Villabona regarding a drug shipment to Detroit. Barona subsequently was arrested in Detroit. The evidence, when viewed in the light most favorable to the government, was sufficient to convict her of aiding and abetting in this drug delivery.

Martinez was indicted and convicted of counts 1-4 for engaging in the conspiracy, conspiring to possess and

possessing cocaine with intent to distribute, and aiding and abetting with intent to distribute. Martinez was linked to conversations with Villabona on December 9, 1987, in which she discussed the delivery of 300 kilograms of cocaine. On Dec ber 10, 1987, Martinez and Barona delivered 320 kilograms to Harris. She told Villabona that she had another 345 kilograms to deliver the next day. In a March 1988, conversation, Villabona told Martinez to find an additional drug supplier in Columbia. These conversations all support an inference of guilt and knowing participation in the drug scheme. *See United States v. Buena-Lopez*, 987 F.2d 657, 659 (9th Cir. 1993). Martinez's voice was identified by travel agent Rubio. The jury could have accepted this, and Rubio's identification of Martinez's voice was enough to link her to the crimes charged. There was also evidence that showed that Martinez arranged for the delivery of (and delivered) several hundred kilograms of cocaine in December 1987. Villabona would often refer to "the girls" (meaning Barona and Martinez) when discussing drug transactions.

Martinez also contends that a "single conspiracy" was not established. "[W]hether a single conspiracy has been proved, rather than multiple conspiracies . . . is essentially a question of the sufficiency of the evidence." *United States v. Bibbero*, 749 F.2d 581, 586 (9th Cir. 1984) (*Bibbero*), *cert. denied*, 471 U.S. 1103 (1985). At times, we have considered "the nature of the scheme; the identity of participants; the quality, frequency, and duration of each conspirator's transactions; and the commonality of time and goals." *Id.* at 587. "A single conspiracy may involve several sub-agreements or subgroups of conspirators."

United States v. Lujan, 936 F.2d 406, 411 (9th Cir. 1991), *quoting Bibbero*, 749 F.2d at 587.

In this case, the jury could have found the existence of a single conspiracy. The nature of the conspiracy was a cocaine distribution and money collection enterprise, with Bennett and Villabona supervising. The identity of the parties becomes obvious from the telephone records. Conversations and actions link Villabona, Bennett, Martinez, Barona, Harris, and McCarver. For example, Barona and Martinez delivered cocaine to Harris and McCarver for resale. Villabona and Bennett spoke to Barona and Martinez about collecting money and delivering cocaine. Toll records of calls made with cellular telephones also connected all of the appellants; often Villabona would call Barona and Martinez and then immediately call Harris or Bennett. Bennett and Villabona, while traveling abroad, contacted Martinez and Barona about their transactions. These contacts were also constant over time. All of the appellants had a different role but a common plan and goal. A rational jury could have concluded that there was one large conspiracy.

Bennett was charged and convicted of counts 1-5 (conspiracy and possession with intent to distribute under 21 U.S.C. §§ 846, 841(a)(1)), counts 12 and 17 (violations of 31 U.S.C. § 5324, illegal structuring), and count 28 (being a principal administrator of a CCE in violation of 21 U.S.C. § 848). The evidence is sufficient to convict him of all counts discussed in this disposition, except for the counts involving illegal structuring, which are discussed later.

Villabona was charged and convicted on counts 1 (conspiracy), 2-5 (possession with intent to distribute), 7-8 (money laundering), 12-16 (illegal structuring), 19-26 (money laundering), and count 27 (being a principal administrator in a CCE).

Count five involves the seizure of 502 kilograms of cocaine in Missouri. The evidence shows that Villabona was involved in this November 1988, shipment of cocaine from Los Angeles to Detroit. Bennett arranged for Stanley McCarns to secure drivers (James McCarns and Childress) for the shipment. Villabona had conversations with Stanley McCarns about the arrest of James and Childress. Villabona also discussed Stanley McCarns with Bennett. The evidence also supported the view that the November shipment was part of a larger, 700 kilogram shipment and that the extra 200 kilograms was stored in McCarns's garage and later picked up. Bennett relayed this information to Villabona on November 16, 1988. A rational jury could have found Villabona connected with the 502 kilogram shipment in November.

Counts 7 and 8 relate to "Operation Pisces." Leonardo Gomez and Reynaldo Rios made deliveries on March 26 and March 30, 1987. The two men drove to Villabona's residence after delivering the money on March 26. Gomez was ultimately arrested there on May 6, 1987. Money laundering under 18 U.S.C. § 1956(a)(1) requires proof that the defendant "conducted a financial transaction" involving "proceeds of unlawful activity," and that the defendant knew the proceeds came from unlawful activity, and either (a) intended to promote the carrying on of the specific unlawful activity or (b) knew the transaction was designed to conceal or disguise the

nature, location, source, ownership, or control of the proceeds. *See United States v. Montoya*, 945 F.2d 1068, 1076 (9th Cir. 1991). In this case, there was evidence that Villabona aided in this money laundering transaction. Gomez, immediately following the March deliveries, called Villabona on Villabona's cellular telephone. Gomez also went to Villabona's house following each transaction. Villabona also paid for Gomez's legal defense. Villabona discussed Gomez's failed attempt to escape prison with Oscar (a Colombian cocaine supplier). The evidence was sufficient to show that Villabona was aware of and participated in this laundering scheme.

Counts 12-17 charge Villabona and/or Bennett with aiding and abetting Jimmy Washington (who pled guilty) in illegal structuring (e.g. breaking up transactions involving more than $10,000 to evade requirements that financial institutions report transactions in excess of $10,000) in violation of 31 U.S.C. § 5324. *Ratzlaf v. United States*, 114 S. Ct. 655 (1994), holds that a defendant may not be convicted of willfully violating section 5324 unless the jury finds that the defendant "knew the structuring in which he engaged was unlawful." *Id.* at 663. Because the jury instructions did not require this finding, we reverse Villabona's and Bennett's conviction and sentence for these counts. As the district court did not enhance the sentences for the other counts based on these convictions, there is no need for a remand for resentencing. *See Baker*, 10 F.3d at 1421; *United States v. Ray*, 731 F.2d 1361, 1368 (9th Cir. 1984) (*Ray*).

Counts 19-26 involve laundering drug money in violation of 18 U.S.C. § 1956. Villabona argues that the

source of the money was not proven. However, the evidence is clearly sufficient to establish that Villabona's money came from the sale of narcotics.

McCarver was convicted of conspiracy (count 1) and substantive drug offenses (counts 2-5). The evidence was sufficient to convict McCarver. Numerous telephone calls between Bennett and McCarver establish that McCarver delivered drugs to Barona and Martinez, collected drug money, and supplied others with drugs. The testimony of Stanley McCarns, stating that Bennett referred to kilograms of cocaine with terms like "chickens" and "birds," made any reference to these terms in McCarns's conversations unambiguous.

VI

Villabona argues that venue was not proper on counts 2-4. Offenses shall be prosecuted "in a District in which the offense was committed." *See* Fed. R. Crim. P. 18. Villabona was involved in distributing and organizing deliveries of cocaine in Los Angeles. On December 6, 1987, Villabona called Barona in Los Angeles to discuss a drug transaction. On December 9, 1987, Villabona spoke with Martinez in Los Angeles and discussed a drug transaction. And on December 10, 1987, Villabona called Harris in Los Angeles and discussed a transaction between Harris and "the girls" (Barona and Martinez). After the December call to Harris, Villabona called Martinez in Los Angeles to confirm that she had a substantial quantity of cocaine to deliver to Harris. Villabona then called Harris back and arranged for the delivery of the cocaine, and he thereafter called Martinez and told her to

deliver the drugs to Harris. Martinez (in Los Angeles) then telephoned Harris (in Los Angeles) and then called Villabona back, telling him "mission accomplished" and discussing another cocaine delivery (this time to McCarver) to take place the next day. These conversations between Villabona, Martinez, and Harris show that Villabona aided and abetted the possession of cocaine in the Central District of California (counts 2-4).

VII

Bennett and Villabona contend that the jury instructions regarding the CCE statute resulted in an ex post facto application as to them. Bennett and Villabona argue that the jury instructions "permitted the jury to convict upon facts occurring before the effective date" of 21 U.S.C. § 848(b). This argument misconstrues the applicability of the ex post facto clause.

A person is engaged in a CCE if, among other things, he violates at least three felony violations of federal narcotics law. *United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1571 (9th Cir. 1989) (*Hernandez-Escarsega*), *cert. denied*, 497 U.S. 1003 (1990). Villabona and Bennett assert that the three acts that constitute the "continuing series" of narcotics violations cannot be acts occurring before October 26, 1986, the effective date of the statute. They then assert that the jury instructions permitted the jury to convict based on facts that occurred before this date.

Using pre-October 26, 1986, acts as one of the "series of violations" for establishing the existence of a CCE may violate the ex post facto clause. The ex post facto clause

prohibits punishing as a crime any act previously committed that was innocent when done, imposing a harsher punishment for a crime after it is completed, or depriving one of a defense available under law when the act was committed. *Baker,* 10 F.3d at 1394. But we need not reach that issue. "It is well established that a statute increasing a penalty with respect to a criminal conspiracy which commenced prior to, but was continued beyond the effective date of the statute, is not *ex post facto* as to that crime." *United States v. Campanale,* 518 F.2d 352, 365 (9th Cir. 1975), *cert. denied,* 423 U.S. 1050 (1976).

Therefore, the jury could consider pre-October 26, 1986, acts to determine whether the conspiracy *existed,* but could only consider the subclass of post-October 26, 1986, acts within that entire conspiracy in order to determine if Villabona and Bennett were engaged in supervising a CCE. That certain acts in furtherance of the overall conspiracy may have occurred before the effective date of section 848(b) is of no moment.

The district judge specifically limited the jury to considering *post*-October 27, 1986, acts relating to section 848(b)'s requirement that Villabona and Bennett be a principal administrator, including whether they received substantial revenue (at least $10 million in gross receipts) or were involved in a series of drug violations involving at least 150 kilograms of cocaine.

The jury instruction quoted by Villabona allowed the jury to consider "any relevant conduct . . . in determining whether defendant Villabona caused a series of violations of the federal narcotic laws, and whether he did so in concert with at least five other persons. . . . " But that

instruction is then modified and made clearer by the instruction immediately following the one quoted by Villabona: "*With respect to count one,* however, you must find that defendant Villabona participated in the conspiracy charged in that count and that all essential elements of that count were proven to exist *after October 27th, 1986, in order to consider count one as one of the series of violations* alleged in count twenty-seven." (Emphasis added.) This charge clarifies what acts are to be considered by the jurors in determining whether a "series of violations" occurred to satisfy the conditions of the CCE statute.

The next instruction specifically limits the jurors to considering post-October 27, 1986, conduct in determining whether Villabona was a principal administrator of a CCE, whether the enterprise received over $10 million in gross receipts, and whether the series of narcotic violations involved at least 150 kilograms of cocaine. The instructions regarding Bennett were the same. When viewed in their entirety, the instructions did not allow the jurors to use pre-October 26, 1987, conduct to convict Villabona and Bennett of a CCE. These instructions, taken as a whole, were not "misleading" or "inadequate to guide the jury's deliberations." *Baker,* 10 F.3d at 1417, *quoting United States v. Shortt Accounting Corp.,* 785 F.2d 1448, 1454 (9th Cir.), *cert. denied,* 478 U.S. 1007 (1986).

VIII

Villabona raises two other complaints about the jury instructions. He first argues that the quantity of drugs required under section 848(b) (2) (A) is not 150 kilograms

(as the district judge instructed) but rather 1500 kilograms. It is clear that section 848(b) (2) (A) requires "at least 300 times" the quantity of cocaine referenced in section 841(b) (2) (B). That amount is 300 times "500 grams or more." This equals 150 kilograms or more of cocaine. The jury was properly instructed on this point.

Villabona next argues that special verdicts were improper in this case and were used solely to correct a problem with the jury instructions that allowed jurors to apply the CCE statute in violation of the ex post facto clause. We have already concluded that there was no ex post facto violation. While special interrogatories are "generally disfavored," *United States v. Pforzheimer,* 826 F.2d 200, 205 (2d Cir. 1987) (*Pforzheimer*), "most criticism of special verdicts in criminal cases is based on the danger that such verdicts might be devices for bringing judicial pressure to bear on juries in reaching their verdict." *United States v. O'Looney,* 544 F.2d 385, 392 (9th Cir.), *cert. denied,* 429 U.S. 1023 (1976). That did not occur here, and there was no reversible error. *See Pforzheimer,* 826 F.2d at 206; *United States v. Vascqez-Velasco,* 15 F.3d 833, 847 & n.11 (9th Cir. 1994). In this case the special verdict was not given to the jury until *after* the general verdict – so there was no chance of improper influence. Villabona gives no reason for thinking that the special verdict forms were improperly used in this case. The district court did not abuse its discretion in submitting special verdicts.

IX

Villabona and Bennett further contend that sections 848(c) (2) (A) and 848(b)(2) (A) of the CCE statute are

unconstitutionally vague. To prove a statute unconstitutionally vague, it must be shown that the statute "(1) does not define the conduct it prohibits with sufficient definitiveness and (2) does not establish minimal guidelines to govern law enforcement." *Baker*, 15 F.3d at 911.

We have previously held that the words "organizer," "supervisory position," and "management" "enjoy a wide currency in the business community and are commonly understood by members of the general public." *Ray*, 731 F.2d at 1367, *quoting United States v. Valenzuela*, 596 F.2d 1361 (9th Cir.), *cert. denied*, 444 U.S. 865 (1979).

Section 848(b)(2) (A) refers to violations in "subsection (d)(1) of this section." There is no such subsection. But Congress obviously meant subsection (c) (1); there is a typographical error in the statute. In any event, we need not reach the issue. Even if section 848(b) (2) (A) were unconstitutionally vague, the special verdict informs us that the jury found section 848(b) (2) (B) applicable, which would result in the same mandatory life sentence.

Villabona and Bennett also suggest that section 848(c)(2)(A) is vague. This section requires the government to prove that a defendant acted "in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management." The argument is that these terms fail to give adequate notice as to which conduct is prohibited. *See United States v. Dorey*, 711 F.2d 125, 128 (9th Cir. 1983) (Due process "requires that a statute, which is used as the basis of a criminal charge, give fair warning of the conduct which is

prohibited so that each person can conform his conduct to the requirements of the law.").

Our cases have already rejected similar vagueness arguments. We have held that a district court was not required to define the concepts of "management" or "supervision" because these terms "are neither outside the common understanding of a juror, nor so technical or ambiguous as to require a specific definition." *Hernandez-Escarsega*, 886 F.2d at 1571, *quoting United States v. Johnson*, 575 F.2d 1347, 1357-58 (5th Cir. 1978), *cert. denied*, 440 U.S. 901 (1979); *see also Ray*, 731 F.2d at 1367 (such words are "commonly understood"). The jurors could have found that Villabona and Bennett "supervised" and were "principal administrators" in this ongoing conspiracy. These terms are not unconstitutionally vague.

X

Finally, Villabona raises three arguments regarding improper government conduct. First, Villabona asserts that the prosecutor's argument to the jury was improper. It is impermissible to comment on a defendant's failure to testify because there is a Fifth Amendment right not to do so. *Griffin v. California*, 380 U.S. 609, 614 (1965). We have held that a prosecutor may not "call attention to the defendant's failure to testify" or make a comment of "such a character that the jury would naturally and necessarily take it to be a comment on the failure to testify." *United States v. Tarazon*, 989 F.2d 1045, 1051-52 (9th Cir.), *cert. denied*, 114 S. Ct. 155 (1993). In *Lincoln v. Sunn*, 807

F.2d 805 (9th Cir. 1987), we said that an improper comment of this kind warrants reversal "where such comment is extensive, where an inference of guilt from silence is stressed to the jury as a basis for the conviction, and where there is evidence that could have supported acquittal." *Id.* at 809, *quoting United States v. Kennedy*, 714 F.2d 968, 976 (9th Cir. 1983), *cert. denied*, 465 U.S. 1034 (1984). If the comment at issue would not have affected the verdict, and curative instructions are given, no reversal results. *Id.*

In this case, the prosecutor was discussing a telephone conversation between Villabona and a party not on trial. The prosecutor asked the jury "What is the phone call which is summarized in exhibit 453 about? If not about drugs and drug money . . . what is it about?" That comment was proper, because the prosecutor is allowed to ask the jury to draw inferences from the evidence.

The prosecutor continued by saying "Didn't the defense attorneys think that [such an explanation] would be helpful to you in your deliberations." The prosecutor also stated, regarding another call, "What is the subject matter of this call; if not cocaine, what? Each and every defense counsel, silent." The judge, in response to objections, told the jury that the burden of proof remains on the prosecutor. The judge also denied a motion for a mistrial.

These comments by the prosecutor do not constitute error under *Griffin*. As we have said, "comment on the failure of the *defense* as opposed to the *defendant* to counter or explain the testimony presented or evidence introduced is not an infringement of the defendant's Fifth

Amendment privilege." *United States v. Lopez-Alvarez*, 970 F.2d 583, 596 (9th Cir.) (emphasis in original), *cert. denied*, 113 S. Ct. 504 (1992), *quoting United States v. Castillo*, 886 F.2d 1071, 1083 (9th Cir. 1988). The distinction between the defense and the defendant is crucial here. The prosecutor did not say that Villabona failed to testify, and he did not try to get the jury to infer guilt from his failure to testify. Rather, he highlighted several pieces of evidence and asked what alternative explanation was available to explain its meaning. What's more, the judge immediately told the jury that the burden of proof remains on the government. That instruction prevented the jury from inferring that the defense counsel was required to rebut the evidence. *See United States v. Soulard*, 730 F.2d 1292, 1307 (9th Cir. 1984) ("cautionary instruction . . . was sufficient to cure any prejudice"). This case is similar to *Lopez-Alvarez* where "the prosecutor's statement likely referred to the inadequacy of . . . evidence and not to the fact that the defendant had not testified." 970 F.2d at 596. The comments here did not "materially affect the fairness of the trial." *United States v. Solomon*, 825 F.2d 1292, 1300 (9th Cir. 1987) (*Solomon*), *cert. denied*, 484 U.S. 1046 (1988).

Villabona next contends that the government "misrepresented the truth to the jury" and cites *United States v. Kojayan*, 8 F.3d 1315 (9th Cir. 1993) (*Kojayan*). If a misstatement was made, we will determine whether it was "harmless error beyond a reasonable doubt," because the defense objected to the government's statement at trial. *Solomon*, 825 F.2d at 1300.

The alleged misstatement concerned when the Drug Enforcement Agency (DEA) got access to information

contained on the 1987 Denmark wiretap tapes. The government said that these tapes were not translated or available to the DEA until 1988, and that the DEA was not involved in the taping. This fact was meant to show that the DEA could not have secured permission to set up surveillance and to obtain evidence of drug importation during 1987. These isolated comments could not have prejudiced Villabona. The remarks certainly do not rise to the level in *Kojayan,* where an Assistant United States Attorney told the jury that a potential witness had not entered into an agreement with the government when, in fact, he had. *Kojayan,* 8 F.3d at 1318. The overall point that the government was trying to make was true: government agents did not have enough information in 1987 to start surveillance in the Los Angeles area. The reason is that the agents did not receive the numbers of the telephones being called by Villabona until the Danish wiretaps were concluded. Without that information, the DEA could not have independently initiated surveillance. That fact was what the prosecutor was trying to convey to the jury. Any misstatement was harmless beyond a reasonable doubt.

Villabona's last prosecutorial misconduct argument is that two witnesses – Edward Branch and Ronald Saname – should have been given immunity to testify. Without such, Villabona states that he was denied his due process rights to present a defense and his Sixth Amendment right to confrontation. *See United States v. Whitman,* 771 F.2d 1348, 1351 (9th Cir. 1985) (discussing limitations on discretion to exclude evidence); *United States v. Lord,* 711

F.2d 887, 892 (9th Cir. 1983) (*Lord*) (prosecutorial misconduct causing defense witness to assert the Fifth Amendment results in dismissal).

Branch's testimony was supposed to show that co-conspirator Stanley McCarns's activity was not part of a conspiracy with Villabona. Saname was to testify that the source of Stanley McCarns's cocaine was not Villabona or Bennett.

On cross-examination, the prosecutor asked Branch if he knew what immunity was, and whether he knew that "if you come to court and take an oath and admit a crime, you could be prosecuted for that crime?" This question was prompted by Bennett's attorney, who had asked Branch during direct examination if Branch was promised anything to testify. After a sidebar conference, the judge appointed counsel for Branch and that attorney advised Branch to assert his Fifth Amendment rights. Branch's direct testimony was stricken.

The situation here differs from Lord where prosecutorial misconduct caused a witness to assert his Fifth Amendment rights. In *Lord*, the prosecutor told a witness that "whether he would be prosecuted depended on his testimony." *Lord*, 711 F.2d at 890. This was held to be an attempt to influence the witness's decision about whether to testify, and to influence the witness's decision about what to say on the stand.

In this case, the prosecutor advised Branch on the stand that he "could be" prosecuted for his crimes. He did not suggest to Branch that he should distort or change his testimony to avoid prosecution. He did not tell Branch he should not testify. A defendant does not

have a right to compel the government to grant immunity. "To interpret the Fifth and Sixth Amendments as conferring on the defendant the power to demand immunity for co-defendants, potential co-defendants, or others whom the government might in its discretion wish to prosecute would unacceptably alter the historic role of the Executive Branch in criminal prosecutions." *United States v. Mendia*, 731 F.2d 1412, 1414 (9th Cir.), *cert. denied*, 469 U.S. 1035 (1984), *quoting United States v. Alessio*, 528 F.2d 1079, 1082 (9th Cir.), *cert. denied*, 426 U.S. 948 (1976). There was no misconduct on the part of the prosecutor regarding Branch.

Saname's attorney advised him not to testify absent immunity. Saname took his counsel's advice. Villabona has not charged that the prosecutor purposefully withheld granting immunity to Saname because Saname's testimony would have exonerated Villabona. No claim of prosecutorial misconduct has been stated. Villabona has not shown, as our law requires, that he was denied a "fair trial" or that the government "intentionally distorted" the fact-finding process because Saname did not testify. *See United States v. Westerdahl*, 945 F.2d 1083, 1086 (9th Cir. 1991).

XI

All other issues raised lack merit or are frivolous.

We AFFIRM the convictions and sentences of Barona, Martinez, Harris, and McCarver. We AFFIRM Villabona's and Bennett's convictions and sentences with respect to all counts discussed in this disposition except for counts

12-17 (illegal structuring), which we REVERSE. By a separate opinion, we reverse the convictions of Villabona on count 27 and Bennett on count 28.

Note: This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36.3.

USA V BARONA et al., 90-50519 et al.,

Reinhardt, J., concurring in part and dissenting in part

I concur in part and dissent in part. Although the majority correctly decides most of the defendants' claims, I must express my disagreement with some parts of its decision. I briefly outline the reasons for my disagreement below.

* * *

To begin, I disagree with the majority's holding in Parts IV and V that there was sufficient evidence to prove the existence of a single conspiracy and that the evidence concerning Operation Pisces was properly admitted. Because the two issues are closely related, I discuss them together.

The government introduced evidence concerning an extensive money laundering scheme (Operation Pisces) on the theory that the scheme was part of the conspiracy with which the defendants were charged. I believe, however, that the government has not provided sufficient evidence either to demonstrate that Operation Pisces was part of the overall conspiracy or to establish a connection

between the evidence introduced and the defendants' conduct. In order to convict the defendants in this case, the government was required to provide sufficient evidence to demonstrate the existence of a single conspiracy. *United States v. Bibbero*, 749 F.2d 581, 586 (9th Cir. 1994). Although we have recognized that a single conspiracy may involve sub-agreements or subgroups of conspirators, we have held that the government must prove that "the nature of the scheme; the identity of the participants; the quality, frequency, and duration of each conspirator's transactions; and the commonality of time and goals" reveal the existence of a single conspiracy. *Id.*

The memorandum disposition briefly discusses whether there was adequate evidence to show the existence of a single conspiracy, concluding that "conversations and actions link Villabona, Bennett, Martinez, Barona, Harris, and McCarver." The disposition does not, however, analyze whether Operation Pisces was part of the scheme under the multifactor test outlined in *Bibbero*.

Had the majority properly applied the multifactor *Bibbero* test, it would have concluded that the conspirators have only the most attenuated ties to "Operation Pisces." The *only* evidence that the government has produced to link this $1.2 million money laundering scheme to the other activities with which the conspirators were charged is that there is a connection between a minor participant in the money-laundering scheme – Leonardo Gomez, who merely delivered some of the money – and Villabona, who the government contends is the leader of the drug-distribution conspiracy which is the basis of the defendants' convictions.

This connection, however, is far too attenuated to justify admission of the Operation Pisces evidence as part of the defendants' conspiracy. The only link between the two men is that (1) Gomez went to Villabona's house after one of the deliveries, and (2) Villabona paid Gomez's legal fees and expressed a desire to help him escape from prison after he was caught. Thus, other than the mere fact of association between the leader of the main conspiracy and a minor participant in the Pisces scheme, there appears to be no connection between the conspiracy and the Pisces money laundering scheme. I fail to see how this evidence demonstrates that the schemes are of a similar nature, that the two conspiracies have similar participants and goals, and that the transactions between the two sets of conspirators were frequent and reasonably constant under the standards outlined in Bibbero. Accordingly, I would hold that the evidence concerning Operation Pisces should have been excluded.

Moreover, the dearth of evidence establishing a connection between Villabona and Operation Pisces makes clear that a reasonable jury could not have convicted Villabona of being part of the Pisces money laundering scheme. While the evidence suggests the existence of a friendship between Gomez and Villabona, it does not demonstrate that Villabona was aware of and participated in Gomez's scheme. Since a money laundering conviction requires proof of knowledge or intent, *see United States v. Montoya*, 945 F.2d 1068, 1076 (9th Cir. 1991), I cannot concur with the majority's conclusion in Part V that there was sufficient evidence to convict Villabona of money laundering.

I also believe that the majority erred in Part IV in holding that the district judge properly admitted the drug ledger seized in connection with Operation Pisces. Our decision in *United States v. Enriquez-Estrada*, 999 F.2d 1355, 1360 (9th Cir. 1993), requires that the government make showings of relevance and authenticity to justify admitting drug ledgers. In this case, the ledger was admitted because (1) Gomez's name was on it (and Gomez and Villabona had a close relationship), and (2) it had the name "Oscar" on it (and Villabona was recorded *one year later* making a call to someone named "Oscar"). Moreover, even if the Operation Pisces ledger had been properly admitted as relevant evidence, the ledger should have been authenticated in some manner. *Id.* Here, however, the government admits that it does not know who wrote the ledger and provides no evidence to establish its authenticity. Under such circumstances, the drug ledger should have been excluded from trial.

* * *

There are two other parts of the disposition with which I cannot concur. First, I believe that there was insufficient evidence to convict Barona of Count 5 – aiding and abetting the possession of the 502 kilograms of cocaine that were seized when McCarns and Childress were arrested in Missouri. Although there may be evidence that Barona participated in some of the cocaine deliveries arranged by Villabona, there is no evidence that she was involved in *this* particular delivery. The majority relies almost entirely upon the fact that Villabona called Barona in a suburb of Detroit on November 16, 1988 regarding a drug shipment to Detroit. I fail to see how this phone call establishes that Barona was involved

in the drug shipment that was seized on *November 6*, ten days earlier, especially when the record makes clear that the phone call did not concern the McCarns and Childress shipment. The only other evidence that the majority cites in support of its holding that the evidence was sufficient – the fact that Barona was a member of the conspiracy – cannot be used to justify convicting her for aiding and abetting this particular delivery.

* * *

Finally, I disagree with the conclusion in Part X of the memorandum disposition that no prosecutorial misconduct occurred when the prosecutor induced Edward Branch, a defense witness, to take the Fifth Amendment. The majority concludes that the prosecutor did not attempt to influence the witness' decision about whether or not to testify – that is, that he only advised the witness of his legal rights. I disagree.

One of the key issues on which Edward Branch apparently testified was the criminal activities of McCarns in Missouri (and the fact that these activities were *not* connected, as the government claims, to the Villabona conspiracy). This evidence would clearly have had a significant impact upon the jury's decision to convict Barona and Villabona for the Missouri seizure, and it would also have been relevant to the jury's determination of whether the Missouri seizure was part of a single conspiracy and of whether the evidence was erroneously admitted.

The prosecutor began his cross-examination in the following manner:

> Q: Mr. Branch, do you know what immunity means?
>
> A: Not really, but I have a little, you know – a little know something [sic] about it.
>
> Q: Do you understand that if you come into court and take an oath and admit a crime, you could be prosecuted for that crime?
>
> A: Prosecuted for the crime?
>
> Q: For the crime that you admit under oath in court.
>
> A: I'm in here for the crime.
>
> Q: Well, you told us a few minutes ago that you assisted in the manufacturing of P.C.P. in the 1986 time period in Perris, California. Didn't you just testify to that a few minutes ago?
>
> A: I take the Fifth.
>
> Q: Oh, I take it you don't want to talk about that anymore now that I am asking the questions.

Later, the witness stated that he felt that the prosecutor had "threatened" him.

I disagree with the majority that the prosecutor was merely informing the defendant of his rights. If that were the case, he could have stopped his inquiry after the third question. Instead of giving the witness a general warning, however, the prosecutor pressed the witness about a specific incident. The specificity of the prosecutor's

inquiry clearly indicated to the defendant that the prosecutor could, and would, file charges regarding that statement against the defendant if he continued to testify. Because we held in *United States v. Lord*, 711 F.2d 887, 892 (9th Cir. 1983), that a government attorney may not invoke the possibility of prosecution in order to discourage a witness from testifying, I would require the government either to dismiss the indictment or grant the witness immunity during a new trial.

In all other respects, I concur in the memorandum disposition.

APPENDIX C

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED JUNE 18, 1995

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, -vs- MARIA CECILIA BARONA, Defendant-Appellant.	No. 90-50519 D.C. No. CR-88-0972-WJR-3
UNITED STATES OF AMERICA, Plaintiff-Appellee, -vs- JANET MARTINEZ, aka: LUZ JANET MARTINEZ & LUZ JANETH MARTINEZ, Defendant-Appellant.	No. 90-50536 D.C. No. CR-88-0972-WJR-4
UNITED STATES OF AMERICA, Plaintiff-Appellee, -vs- BRIAN BENNETT, Defendant-Appellant.	No. 90-50686 D.C. No. CR-88-0972-WJR-2

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-vs-

MARIO ERNESTO VILLABONA-ALVARADO, a/k/a Tico,

Defendant-Appellant.

No. 90-50687

D.C. No. CR-88-0972-WJR-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-vs-

MICHAEL DUBARRY McCARVER, a/k/a Mike Bald,

Defendant-Appellant.

No. 90-50691

D.C. No. CR-88-0972-WJR-7

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-vs-

MICHAEL HARRIS, a/k/a Tall Make,

Defendant-Appellant.

No. 90-50694

D.C. No. CR-88-0972-WJR-6

ORDER DENYING REHEARING

(Filed Jul. 18, 1995)

Before: WALLACE, Chief Judge, REINHARDT, Circuit Judge, and TANNER,* District Judge.

A majority of the panel has voted to deny the petitions for rehearing and to reject the suggestions for rehearing en banc. Judge Reinhardt has voted to grant the petitions for rehearing and to accept the suggestions for rehearing en banc.

The full court has been advised of the suggestions for rehearing en banc, and no judge of the court has requested a vote on the suggestions for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing are denied, and the suggestions for rehearing en banc are rejected.

---

* Honorable Jack E. Tanner, United States District Judge, Western District of Washington, sitting by designation.

APPENDIX D

RULING OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM J. REA,
JUDGE PRESIDING

UNITED STATES OF AMERICA, Plaintiff, vs. MARIO ERNESTO VILLABONA, et al., Defendants.	)	CR-88-972-WJR

REPORTER'S TRANSCRIPT OF PROCEEDINGS

DEFENDANTS' VARIOUS MOTIONS

WEDNESDAY, NOVEMBER 29, 1989

VERNA R. MORON
COURT REPORTER PRO TEM
U.S. DISTRICT COURT HOUSE
312 NORTH SPRING STREET
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* * *

First of all, the Court agrees with the Defense, that other than the Milan wiretap, that these were wiretaps

Going to the next question, the Court finds that the order issued by the Danish Court was lawful and in accordance with their law. And notwithstanding that fact, even if they were found to be unlawful, the Court would find and reasonably finds – I think that – strike that part.

The Court finds that the United States authorities reasonably relied upon the representations of the Danish officials with respect to the wiretaps, and therefore they were acting – in the Court's opinion - in good faith.

* * *

Supreme Court, U.S.
FILED
DEC 28 1995
CLERK

(3) (2)

Nos. 95-466, 95-801 and 95-6433

In the Supreme Court of the United States

OCTOBER TERM, 1995

BRIAN BENNETT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

MARIA CECILIA BARONA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

MICHAEL DUBARRY MCCARVER, AKA MIKE BALD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General

JOHN C. KEENEY
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QUESTIONS PRESENTED

1. Whether electronic surveillance of an American citizen traveling abroad that was jointly undertaken by American and foreign law enforcement authorities and that fully complied with the requirements of foreign law violated the Fourth Amendment.

2. Whether the Fourth Amendment applies to electronic surveillance of a resident alien in a foreign country, jointly undertaken by American and foreign law enforcement authorities.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-466

BRIAN BENNETT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 95-801

MARIA CECILIA BARONA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 95-6433

MICHAEL DUBARRY MCCARVER, AKA MIKE BALD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-49a)[1] is reported at 56 F.3d 1087. A related opinion of

[1] "Pet. App." refers to the appendix to the petition in No. 95-466.

the court of appeals (Pet. App. 50a-85a) is unreported, but the judgment is noted at 59 F.3d 176 (Table).

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1995. Petitions for rehearing were denied on July 18, 1995. Pet. App. 86a-88a. The petition for a writ of certiorari in No. 95-466 (Bennett Pet.) was filed on September 18, 1995. On October 10, 1995, Justice O'Connor extended the time within which to file a petition for a writ of certiorari in No. 95-801 to and including November 15, 1995, and the petition (Barona Pet.) was filed on that date. The petition for a writ of certiorari in No. 95-6433 (McCarver Pet.) was filed on October 12, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioners were each convicted of conspiring to possess cocaine with intent to distribute it (Count 1), in violation of 21 U.S.C. 846. Petitioners Bennett, Barona, and Villabona-Alvarado (Villabona) were also convicted on four counts of possessing cocaine with intent to distribute it (Counts 2-5), in violation of 21 U.S.C. 841(a)(1); petitioners Harris, Martinez, and McCarver were convicted on three counts of possessing cocaine with intent to distribute it (Counts 2-4), in violation of 21 U.S.C. 841(a)(1). In addition, Bennett was convicted on two counts of structuring financial transactions to avoid reporting requirements (Counts 12, 17), in violation of 31 U.S.C. 5324; and one count of engaging in a continuing criminal enterprise (CCE) (Count 28), in violation of 21 U.S.C. 848. Villabona was also convicted on ten counts of

money laundering (Counts 7-8, 19-26), in violation of 18 U.S.C. 1956(a)(1); five counts of structuring financial transactions to avoid reporting requirements (Counts 12-16), in violation of 31 U.S.C. 5324; and one count of engaging in a CCE (Count 27), in violation of 21 U.S.C. 848. Bennett was sentenced to life imprisonment and fined $250,000. Harris was sentenced to 235 months' imprisonment, to be followed by five years' supervised release, and fined $80,000. Barona was sentenced to 235 months' imprisonment, to be followed by five years' supervised release, and fined $250,000. Martinez was sentenced to 235 months' imprisonment, to be followed by five years' supervised release, and fined $200,000. Villabona was sentenced to life imprisonment and fined $475,000. McCarver was sentenced to 240 months' imprisonment, to be followed by five years' supervised release, and fined $80,000.

1. During 1987 and 1988, petitioners Bennett and Villabona organized and supervised a criminal enterprise that obtained more than 3,000 kilograms of cocaine from suppliers in Colombia. Petitioners Barona and Martinez delivered the cocaine to petitioners Harris and McCarver and other individuals in Los Angeles, California, for further distribution in the United States. Pet. App. 6a-8a; Gov't C.A. Br. 4-16.[2]

2. At trial, the government introduced into evidence tapes of narcotics-related telephone conversations involving petitioners and other co-conspirators. The conversations had been monitored and inter-

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[2] "Gov't C.A. Br." refers to the brief filed by the United States in the court of appeals in connection with the appeal filed by petitioners Bennett and Harris.

cepted by Danish and Italian law enforcement authorities.

a. In December 1987, petitioners Bennett and Villabona traveled to Copenhagen, Denmark, and registered at the Savoy Hotel. Between December 4 and 7, the Danish police wiretapped the hotel telephone lines and installed an electronic listening device in Villabona's room. Pet. App. 7a, 20a-21a; Gov't C.A. Br. 6-8.

b. On December 7, 1987, petitioner Villabona and his wife, Helle Nielsen, and petitioner Bennett traveled to Aalborg, Denmark, and stayed with Nielsen's parents. Between December 7 and 9, the Danish police wiretapped the telephone line at Nielsen's parents' residence. After Villabona was observed making calls from a public telephone, the Danish police also wiretapped that telephone line. Pet. App. 7a, 21a-22a; Gov't C.A. Br. 8.

c. On December 8, 1987, petitioners Bennett and Villabona returned to Copenhagen and stayed at the Hotel Sara-Dan. On December 8 and 9, the Danish police wiretapped the hotel's telephone line. Pet. App. 7a, 22a; Gov't C.A. Br. 8-9.

d. On December 9, 1987, petitioners Bennett and Villabona flew from Copenhagen to Milan, Italy, where they registered at the Hilton International Hotel. The Italian police wiretapped the telephone line of their room. Pet. App. 7a, 23a; Gov't C.A. Br. 9-11.

e. In late March 1988, petitioner Villabona and Nielsen returned to Aalborg, where they again stayed with Nielsen's parents. Between March 28 and April 16, the Danish police wiretapped the telephone lines of Nielsen's parents' residence and the public telephone in Aalborg. Pet. App. 7a, 22a-23a; Gov't C.A. Br. 11-13.

2. Before trial, petitioners moved unsuccessfully to suppress the tapes of the telephone conversations intercepted by the Danish and Italian authorities. Pet. App. 8a-9a, 89a-90a. The district court ruled that the Fourth Amendment did not apply to the Italian wiretap, because the Italian police did not conduct the wiretap as part of a "joint venture" with American authorities. *Id.* at 8a. Although the court found that the Danish police were engaged in a "joint venture" with American DEA agents, *ibid.*, the court concluded that the Danish wiretaps did not violate the Fourth Amendment, because (i) "the order issued by the Danish Court was lawful and in accordance with their law" and (ii) "the United States authorities reasonably relied upon the representations of the Danish officials with respect to the wiretaps, and therefore they were acting * * * in good faith," *id.* at 8a-9a, 90a.

3. The court of appeals affirmed in part, reversed in part, and remanded. Pet. App. 1a-49a.[3] The court rejected petitioners' claim that the United States' participation in the Danish and Italian wiretaps violated the Fourth Amendment. *Id.* at 8a-24a. The court observed, initially, that "[i]t [wa]s not clear * * * that Villabona or the other non-citizen

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[3] The court reversed the CCE convictions of petitioners Bennett (Count 28) and Villabona (Count 27) and remanded for resentencing, because it concluded that the jury had been improperly instructed on one of the elements of that offense. Pet. App. 24a-29a. In a separate unpublished opinion, the court also reversed certain of the illegal structuring convictions of Bennett (Counts 12, 17) and Villabona (Counts 12-16), on the ground that the jury had been improperly instructed on one of the elements of the offense. *Id.* at 66a. The court rejected petitioners' other claims of error. *Id.* at 50a-85a.

defendants * * * [we]re entitled to receive any Fourth Amendment protection whatsoever," particularly "in the context of an *extraterritorial* search." *Id.* at 18a (citing *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990)). The court believed that it "could hold * * * that Barona, Martinez, and Villabona ha[d] failed to demonstrate that, at the time of the extraterritorial search, they were 'People of the United States' entitled to receive the 'full panoply of rights guaranteed by our Constitution.'" Pet. App. 18a (quoting *United States* v. *Verdugo-Urquidez*, 856 F.2d 1214, 1236 (9th Cir. 1988) (Wallace, C.J., dissenting), rev'd, 494 U.S. 259 (1990)). It "cho[se], however, not to reach the question because even if [the non-citizen defendants] were entitled to invoke the Fourth Amendment, their effort would be unsuccessful." Pet. App. 18a.

Relying principally on the Ninth Circuit's earlier decision in *United States* v. *Peterson*, 812 F.2d 486, 490 (1987) (Kennedy, J.), the court held that the involvement of American law enforcement authorities in the Danish and Italian wiretaps did not violate the Fourth Amendment. Pet. App. 8a-24a. The court observed that "[n]either our Fourth Amendment nor the judicially created exclusionary rule applies to acts of foreign officials" (*id.* at 9a (quoting *United States* v. *LaChapelle*, 869 F.2d 488, 489 (9th Cir. 1989))) unless (1) "the circumstances of the foreign search and seizure are so extreme that they 'shock the [judicial] conscience,' [so that] a federal appellate court in the exercise of its supervisory powers can require exclusion of the evidence," or (2) "United States agents' participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials" (Pet. App.

10a (quoting *Peterson*, 812 F.2d at 490)). "If a joint venture is found to have existed," the court explained, "the law of the foreign country must be consulted at the outset as part of the determination whether or not the search was reasonable." Pet. App. 10a (quoting *Peterson*, 812 F.2d at 490). So long as a foreign search complies with applicable foreign law, the court held, the search is reasonable under the Fourth Amendment. Pet. App. 10a n.1.[4]

The court of appeals concluded that "the district court did not clearly err in finding that the four Danish wiretaps at issue were 'joint ventures.'" Pet. App. 18a. And, after concluding that each of those wiretaps complied with the requirements of Danish law, *id.* at 19a-23a, the court agreed that the United

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[4] In *Peterson*, DEA agents had participated with Philippine authorities in wiretapping the telephone line of an apartment in Manila that was rented by one of the defendants. 812 F.2d at 488-489. Writing for the court, then-Judge Kennedy explained that, if "United States agents' participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials, the law of the foreign country must be consulted at the outset as part of the determination whether or not the search was reasonable." *Id.* at 490. After concluding that the wiretapping operation at issue was a joint venture, the court assumed, for purposes of analysis, "that the search did not comply with Philippine law and was, as a result, not reasonable under the fourth amendment," *id.* at 491, but held that the evidence was nonetheless admissible under the good-faith exception to the exclusionary rule, because the United States agents had reasonably relied on the representations of the Philippines' authorities that the wiretap complied with Philippine law. *Id.* at 491-492. See also *United States* v. *Juda*, 46 F.3d 961, 968 (9th Cir.) ("In *Peterson*, we held that a foreign search is reasonable if it conforms to the requirements of foreign law."), cert. denied, 115 S. Ct. 1811, 2632 (1995).

States' participation in the wiretaps did not violate the Fourth Amendment, *id.* at 24a.

The court also concluded that the district court did not clearly err when it found that the Italian wiretap had not been undertaken as part of a joint investigation. Pet. App. 23a. "Because th[at] wiretap was conducted by foreign officials without substantial United States involvement," the court explained, "Fourth Amendment principles do not apply." *Id.* at 23a-24a.

Judge Reinhardt dissented in part. Pet. App. 30a-49a. In his view, a search of an American citizen abroad by foreign authorities, at the behest and for the benefit of United States authorities, that fully complies with the requirements of foreign law is an unreasonable search under the Fourth Amendment unless supported by probable cause. *Id.* at 31a-42a. Judge Reinhardt found the majority's reliance on *Peterson* misplaced, because "*Peterson* never discusse[d] the critical question of whether American officials must have *probable cause* for inducing a foreign government to carry out a search." *Id.* at 43a. He would have relied, instead, on the court of appeals' reasoning in *Verdugo-Urquidez*, in which the court had held that probable cause was required for a foreign search of a nonresident alien. *Id.* at 44a-47a. Judge Reinhardt recognized that this Court reversed the court of appeals' decision in that case, but in his view this Court "left the part of the *Verdugo* analysis relevant to this case undisturbed." *Id.* at 45a.

ARGUMENT

1. Petitioners contend (Bennett Pet. 4-8, 11-13; Barona Pet. 11-18; McCarver Pet. 6) that the tapes of the telephone conversations obtained through the

Danish wiretaps should not have been admitted at trial, because (in petitioners' view) the United States' participation in the Danish wiretaps violated the Fourth Amendment. Relying largely on Judge Reinhardt's dissenting opinion, petitioners argue (Bennett Pet. 12-13; Barona Pet. 15-18) that a foreign search of an American citizen must both comply with the requirements of foreign law and be supported by probable cause.[5] Neither this Court nor any court of appeals has embraced that view.

a. The Fourth Amendment generally requires that United States law enforcement officials obtain a warrant based on probable cause before conducting a search to discover evidence of criminal wrongdoing. *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989); *United States* v. *United States District Court*, 407 U.S. 297, 315 (1972). Probable cause is also generally required in circumstances where no warrant is necessary. See, *e.g.*, *Vale* v. *Louisiana*, 399 U.S. 30 (1970) (warrantless search of home); *Chambers* v. *Maroney*, 399 U.S. 42 (1970) (warrantless search of vehicle). But, as this Court has repeatedly observed, "the special content and incidents of [the right to be free from unreasonable searches and seizures] must be shaped by the context in which it is asserted," *Wyman* v. *James*, 400 U.S. 309, 318 (1971) (quoting *Terry* v. *Ohio*, 392 U.S. 1, 9

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[5] Although petitioners Bennett and Harris generally assert (Bennett Pet. 4) that "serious questions existed and still exist as to the orders' validity under Danish law," they do not specify how any of the wiretaps failed to comply with the requirements of Danish law. In any event, both the district court and the court of appeals concluded that the wiretaps were valid under Danish law; petitioners' fact-bound claim to the contrary does not warrant this Court's review.

(1968)), and "[a] search unsupported by probable cause can be constitutional * * * 'when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable,'" *Vernonia School District 47J* v. *Acton*, 115 S. Ct. 2386, 2391 (1995) (quoting *Griffin* v. *Wisconsin*, 483 U.S. 868, 873 (1987)).

"Special needs" exist in the context of a foreign search. As this Court has recognized, "[f]or better or for worse, we live in a world of nation-states in which our Government must be able to 'functio[n] effectively in the company of sovereign nations.' Some who violate our laws may live outside our borders under a regime quite different from that which obtains in this country." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 275 (1990) (citation omitted). Foreign authorities operating within their own countries may not be willing to forgo a search that can be validly conducted under their law until American authorities are satisfied that probable cause exists. And American officials seeking to enlist the cooperation of foreign authorities in conducting a foreign search cannot insist that the foreign legal system conduct itself in accordance with domestic standards. Rather, as then-Judge Kennedy recognized in *United States* v. *Peterson*, 812 F.2d 486 (9th Cir. 1987), a foreign "joint venture" search of an American citizen that conforms to the requirements of foreign law should be accepted as reasonable within the meaning of the Fourth Amendment. *Id.* at 491; cf. *Verdugo-Urquidez*, 494 U.S. at 279 (Stevens, J., concurring in the judgment) (agreeing that "search conducted by the United States agents with the approval and cooperation of the Mexican authorities was not 'unreasonable'").

In the context of domestic searches, this Court has recognized that the reasonableness of expectations of privacy is grounded in "our *societal* understanding that certain areas deserve the most scrupulous protection from government invasion." *California* v. *Greenwood*, 486 U.S. 35, 43 (1988) (quoting *Oliver* v. *United States*, 466 U.S. 170, 178 (1984)) (emphasis added in *Greenwood*); see also *United States* v. *Jacobsen*, 466 U.S. 109, 122 (1984); *Rakas* v. *Illinois*, 439 U.S. 128, 143 n.12 (1978); *Katz* v. *United States*, 389 U.S. 347, 360-362 (1967) (Harlan, J., concurring). The legitimacy of expectations of privacy in a foreign country should similarly be judged by the societal understandings prevailing in that country. See *Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring) (noting the relevance of "differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad"). As one commentator has observed: "A country's law provides the surest source for ascertaining its societal norms of privacy. The law of a foreign country, then, should determine the reasonableness of an expectation of privacy within that country." Note, *The Extraterritorial Applicability of the Fourth Amendment*, 102 Harv. L. Rev. 1672, 1687 (1989) (footnote omitted). An American citizen in a foreign country cannot, therefore, legitimately claim any greater expectation of privacy with respect to searches by that country's authorities than that recognized by the country's laws. Moreover, the American citizen cannot legitimately claim an expectation of privacy as against domestic law enforcement officers acting in concert with foreign authorities that he did not possess as against the foreign authorities acting alone. Cf. *California* v. *Greenwood*, 486 U.S. at 40-41; *California* v.

Ciraolo, 476 U.S. 207, 213-214 & n.2 (1986). Hence, a search conducted by foreign law enforcement officials and American agents abroad in compliance with the requirements applicable to the foreign officials does not violate the American citizen's reasonable expectation of privacy.[6]

b. Contrary to the contentions of petitioners Bennett and Harris (Pet. 5-6), the court of appeals' decision in this case does not conflict with this Court's decision in *Reid* v. *Covert*, 354 U.S. 1 (1957). That case held only "that United States citizens stationed abroad could invoke the protection of the Fifth and Sixth Amendments." *Verdugo-Urquidez*, 494 U.S. at 259. In this case, the court of appeals acknowledged that the Fourth Amendment applies to "joint venture" searches of American citizens abroad.

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[6] Petitioners' alternative claim (McCarver Pet. 6; Barona Pet. 17-18) that the foreign surveillance undertaken in this case was conducted abroad purposefully to evade the need to establish probable cause is equally without merit. Even if the surveillance of petitioners Bennett and Villabona had been conducted abroad for that purpose—and petitioners provide no support whatever for that allegation—this Court has never suggested that a lawful search is invalid because of the motives of the law enforcement officers, see *Horton* v. *California*, 496 U.S. 128, 138 (1990), or that a lawful search would be invalid if a court thought it were undertaken to circumvent otherwise applicable restrictions. For example, an officer may not generally make a warrantless arrest of an individual in his home, but nothing prevents the officer from avoiding the warrant requirement by waiting to make the arrest when the individual steps outside. *Byars* v. *United States*, 273 U.S. 28 (1927), does not assist petitioners. *Byars* held only that, in a joint operation by state and federal officers, the United States may not "avail itself of evidence *improperly* seized by [the] state officers." *Id.* at 33 (emphasis added).

It concluded, however, that the searches at issue complied with the Fourth Amendment.

c. As Judge Reinhardt noted below (Pet. App. 44a-45a), the Ninth Circuit held in *United States* v. *Verdugo-Urquidez*, 856 F.2d 1214, 1228-1230 (1988), rev'd, 494 U.S. 259 (1990), that the Fourth Amendment requires American agents to obtain a warrant based on probable cause in order to conduct a foreign search of a foreign national. This Court categorically rejected the court of appeals' reasoning in that case, and held that the Fourth Amendment does not apply to a foreign search of a foreign national. *Verdugo-Urquidez*, 494 U.S. at 274-275. Although this Court had no occasion in *Verdugo-Urquidez* to decide whether a foreign search of an American citizen must be supported by probable cause, the Court cast a skeptical eye on the proposition. *Id.* at 274 (noting that court of appeals' "global view" of the Fourth Amendment—including the court of appeals' holding that "American agents would have to articulate specific facts giving them probable cause to undertake a [foreign] search or seizure"—would "plunge [the Executive and Legislative Branches] into a sea of uncertainty"). In any event, the existence *vel non* of an intra-circuit conflict between whatever remains of *Verdugo-Urquidez* and the decision of the panel in this case is a matter for the Ninth Circuit to resolve, and does not warrant review by this Court.

2. There is no merit to the claim (Bennett Pet. 8-11) that the court of appeals' decision "runs afoul" of 50 U.S.C. 401 and "contravenes" Executive Order No. 12,333, 46 Fed. Reg. 59,941 (1981). That statute and executive order address only the manner in which intelligence activities relating to national security and foreign policy may be conducted by certain de-

partments and agencies of the government. Indeed, Section 2.2 of Executive Order No. 12,333 states that "[n]othing in this Order shall be construed to apply to or interfere with any authorized civil or criminal law enforcement responsibility of any department or agency."

Nor is there any merit to the related claim (Bennett Pet. 10-11, 14) that Congress's failure to provide limitations applicable to law enforcement searches overseas similar to those applicable to overseas intelligence activities deprives American citizens who are subject to overseas law enforcement searches of equal protection of the laws. Petitioners do not contend that the governmental policies at issue in this case distinguish among classes of American citizens.[7] Absent such discrimination, Congress may address concerns that it has with respect to particular governmental functions without addressing such concerns across the board:

> The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which

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[7] Congress has, in fact, restricted the overseas activities of American officers or employees in the narcotics area, albeit only with respect to "arrest[s] in [a] foreign country as part of [a] foreign police action" and "interrogat[ion] or * * * presen[ce] during the interrogation of [a] United States person arrested in [a] foreign country." 22 U.S.C. 2291(c)(1) and (5). Congress's determination not to restrict the overseas activities of narcotics agents more extensively suggests that it did not find such restrictions necessary or desirable.

> seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.

FCC v. *Beach Communications, Inc.*, 113 S. Ct. 2096, 2102-2103 (1993) (quoting *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955)).

In any event, petitioners did not advance any claims premised on 50 U.S.C. 401 or Executive Order No. 12,333 in the court of appeals, and those claims are not properly raised for the first time in this Court. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

3. Finally, petitioners Barona, Martinez, and Villabona contend (Pet. 19-22) that the Court should resolve in this case the applicability of the Fourth Amendment to extraterritorial searches of resident aliens and illegal aliens who have "substantial connections" to the United States. The court of appeals did not decide that issue in this case, however.[8] Particularly in the absence of any demonstrated conflict among the lower courts, there is no warrant for this Court to address the issue in the first instance.

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[8] Although the court of appeals suggested that it could have relied on petitioners' "fail[ure] to demonstrate that, at the time of the extraterritorial search, they were 'People of the United States' " entitled to the protections of the Fourth Amendment, the court chose "not to reach th[at] question because even if they were entitled to invoke the Fourth Amendment, their effort would be unsuccessful." Pet. App. 18a.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1995

(2)

Supreme Court, U.S.
FILED
JAN 4 1996
CLERK

No. 95-466

In The

Supreme Court of the United States

October Term, 1995

BRIAN BENNETT,
MICHAEL HARRIS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONERS IN REPLY

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15 pp

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ARGUMENT

I. Petitioner Bennett had a reasonable expectation of privacy in his Danish hotel room.

The Government raises the issue: of Petitioners' reasonable expectation of privacy under the fact of this case and concludes that petitioners had no such expectation. This Court, in *California v. Greenwood,* 486 U.S. 35 (1988), stated: "An expectation of privacy does not give rise to Fourth Amendment protection, however, unless society is prepared to accept that expectation as objectively reasonable." *Greenwood,* 486 U.S. at 3940. Petitioner Bennett was in a Denmark hotel when his phone was tapped by Danish officials at the behest of American law enforcement. The request for the electronic surveillance of Petitioner Bennett was made simply because he was travelling with an individual who was being investigated by the United States Government. To say that, under these circumstances, Petitioner had no reasonable expectation of privacy is suspect. Society would surely recognize that an American citizen, at home or abroad, has an expectation of privacy in a hotel room. Furthermore, the Government's reasoning that an American citizen travelling abroad can only claim a reasonable expectation of privacy as recognized by the foreign country's laws fails on the facts of this case. This was a joint venture of the United States Government and the Danish police. The United States officials stood by silently while the Danish police obtained a warrant with information known by the American Drug Enforcement agents to be false. Petitioner Bennett not only had a reasonable expectation of privacy but a reasonable expectation that his own Government would

not circumvent the laws of both the United States as well as those of the foreign country in which he was travelling. The Government's wilful misconduct takes this case beyond the pale of acceptable behavior on the part of law enforcement. Under the totality of the circumstances, Petitioner Bennett had a reasonable expectation of privacy which was wilfully violated by American law enforcement.

II. The "special needs" exception to the Fourth Amendment is not applicable in this case.

The Government also argues that this Court should decline to hear this case because the search involved herein falls into the "special needs" exception to the Fourth Amendment. *Griffin v. Wisconsin*, 483 U.S. 868 (1987). The "special needs" exception has been held to apply to school searches, (*Vernonia School District 47J v. Acton*, 115 S. Ct. 2386 (1995)), searches of probationers, (*Griffin v. Wisconsin*, 483 U.S. 868 (1987)), and premises of highly regulated businesses (*New York v. Burger*, 482 U.S. 691 (1987)), to name a few. However, the "special needs" exception has not been held to apply, contrary to the Government's suggestion, to foreign searches of American citizens at the behest of their own Government. Furthermore, the Government's contention that a probable cause requirement in foreign searches will create difficulties for foreign and domestic law enforcement is, under any circumstances, ludicrous. What is truly at issue here is an American citizen's Fourth Amendment right to be free of unreasonable searches and seizures by his or her Government anywhere in the world. While the Government's quotation of *United States v. Verdugo-Urquidez*,

494 U.S. 259 (1990) which recognizes that Government must be able to function among other sovereign nations and that some who violate American law may live outside the borders of the United States (Gov't's Brief at 10) is a fair statement of both fact and policy, those facts and policies simply do not apply here. Without question the United States controlled the operation which led to the wiretapping of Petitioner Bennett's hotel room. There was no cooperation among the Americans and Danish officials, other than Danish willingness to accede to the strong requests of the Drug Enforcement agents. There was no Danish investigation then pending, nor did any such investigation ever develop. Therefore, the concern that two sovereigns must be free to reciprocate their law enforcement efforts is not raised here. Additionally, the *Verdugo* quotation offered by the Government refers directly to nonresidents ("some who violate our laws may live outside our borders under a regime quite different from [ours]." *Verdugo-Urquidez,* 494 U.S. at 275). Again, what sets this case apart from *Verdugo-Urquidez* is the fact that Petitioners are American citizens. (See Justice Kennedy's concurrence in *Verdugo-Urquidez*: "[t]he rights of a citizen, as to whom the United States has continuing obligations, are not presented by this case." *Verdugo-Urquidez,* 494 U.S. at 278). Petitioners Bennett and Harris do not reside outside our borders under a different regime. They are, therefore, entitled to the panoply of rights under their, the United States, Constitution. In fact, the very act of travelling under an issued American passport conveys to American citizens the protection of their Government, not the converse.

III. The Equal Protection argument raised in the petition is properly before this Court and Petitioners should be granted the opportunity to address the merits of their Equal Protection claim.

The Government attempts to summarily dismiss Petitioners' Equal Protection argument vis-a-vis 50 U.S.C. § 401 and Executive Order No. 12,333 by stating that the claims were not raised on direct appeal. Petitioners raised the claim in a Motion to File Supplemental Authority to Petition for Rehearing and Suggestion for Rehearing En Banc to the Ninth Circuit Court of Appeals. The Motion to File Supplemental Authority to Petition for Rehearing and Suggestion for Rehearing En Banc appears in the Appendix to this Reply Brief at 1a. As such, Petitioners should be permitted to proceed with their claim before this Court.

Petitioners also respond to the Government's characterization of the merits of Petitioner's Equal Protection claim. Petitioner has raised the issue that the Court of Appeals' decision in this case, when placed aside 50 U.S.C. § 401 and Executive Order 12,333, works a denial of equal protection of laws. Petitioner acknowledges that a statutory classification which is neither suspect nor infringes upon fundamental constitutional rights is subject to rational basis review. *FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101 (1993) (citations omitted). Petitioner further acknowledges that such statutes come cloaked in a presumption of validity. *Id.* While proving a denial of equal protection in this instance is a heavy burden to bear, it is not an insurmountable one. This is particularly true when, as here, the law provides one set

of standards for a particular class of citizens and a separate set of standards for another class of citizens. As pointed out in the Petition, those suspected of the heinous crime of treason are afforded more protection from unreasonable searches and seizures than those suspected of narcotics violations, or, for that matter, almost any other crime. Petitioners assert that they can amply challenge this classification and show that there exists no rational basis to provide *more* protection for those suspected of national security violations than for those who are suspected of other violations of law. As such, this Court should accept jurisdiction on this issue and allow the Petitioner to proceed on the merits.

IV. CONCLUSION

The Government has provided no legitimate basis for denying the petition for a writ of certiorari. Petitioners have repeatedly emphasized that this Court has never spoken directly to the issues presented in this case. Further, the case deals with fundamental principles of Fourth Amendment jurisprudence, its application to American citizens abroad and the effect of United States governmental misconduct while engaged in a joint venture with a foreign sovereign. These issues are far too important to allow them to remain undecided by the highest Court in the land. As it now stands, the Ninth Circuit's opinion in this case is bad precedent which will only further the violations of constitutional rights upon those the Constitution intended to protect, i.e., American citizens.

Therefore, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	*U.S.C.A. Nos. 90-50686, and 90-50694*
Plaintiff/Appellee,	
v.	*MOTION FOR PERMISSION TO FILE SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF THEIR PETITION AND SUGGESTION FOR A REHEARING EN BANC*
BRIAN BENNETT and MICHAEL HARRIS,	
Petitioners/Appellants.	

COME NOW Petitioners/Appellants Brian Bennett and Michael Harris, by and through their undersigned counsel, David E. Kenner and Alvin E. Entin, and file this Motion for Permission to File Supplemental Points and Authorities in Support of their Petition and Suggestion for a Rehearing En Banc. This Supplemental Authority is found in 50 U.S.C. §401 and Executive Order number 12333 United States Intelligence Activities dated December 4, 1981.

This authority raises significant support for the Defendant/Appellant's Suggestion and Petition for Rehearing En Banc originally filed on June 15, 1995.

DATED:

ALVIN E. ENTIN
A Professional Corporation
By: _____
ALVIN E. ENTIN
Attorney for Petitioner
BRIAN BENNETT and
MICHAEL HARRIS

Respectfully submitted,

Law Offices of DAVID E. KENNER

By: _____
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MEMORANDUM OF POINTS AND AUTHORITIES

ARGUMENT

I. CONGRESSIONAL INTENT ON THE INTERNATIONAL ACTIVITIES OF LAW ENFORCEMENT INTELLIGENCE GATHERING AGENCIES MAY BE DISCERNED FROM A REVIEW OF 50 U.S.C. §401.

The Defendants/Appellants, BENNETT and HARRIS direct this Court's attention to 50 U.S.C. §401 dealing with National Security. In particular, Defendants/Appellants would point to more specifically, Executive Order number 12333 United States Intelligence Activities dated December 4, 1981. In this Chapter provision matters particularly relevant to the panel opinion and Petition for Rehearing are found. In particular, the Executive Order demonstrates that there was clear Congressional intent exemplified in regard to an attempt to exercise extra territorial activity by American Intelligence Agencies in their information gathering capacities. Section 2.1 et seq. of part 2 specifically sets forth the need and purpose for the collection of information and sets forth additionally significant concerns in the areas of National Defense and Foreign Relations. As was pointed out with great specificity in Section 2.1:

> *"Accurate and timely information about the capabilities, intentions and activities of foreign powers, organizations, or persons and their agents is essential to informed decision making in the areas of National Defense and Foreign Relations. Collection of such information is a priority objective and will be pursued in a vigorous, innovated and responsible manner that is consistent with the Constitution and applicable law and respectful of the principles upon which the United States was founded."*

Thus, Congress clearly intended to place restraints in Intelligence gathering agencies in the two most important areas involving the viability of our Republic: National Defense and Foreign Relations. Thereafter, Part 2 contains significant discussions concerning the collection of information. In Section 2.4 it indicates that agencies are not authorized to use such techniques as electronic surveillance, unconsented physical searches, overt surveillance, physical surveillance or monitoring devices unless they are in accordance with the procedures established by the head of the agency concerned and approved by the Attorney General. These requirements are delineated by Congress to "protect Constitutional and other legal rights and limit the use of such information to lawful Government purposes."

What is particularly illuminating about the authorization to surveille given to Intelligence Agency is that it requires specific Attorney General approval prior to institution under the provisions of paragraph 2.5. Not only is the Attorney General required to approve the use of the intrusive investigative technique prior to entering into extensive surveillance but these strictures are illustrative by way of analogy to the matters decided in the instant case. Congress requires the Attorney General's approval and imposes on the Attorney General the duty of ascertaining probable cause before engaging in or allowing agencies under the authority of the Attorney General to engage in electronic and other surveillance techniques abroad. As a result, paragraph 2.5 reads as follows:

> *"The Attorney General hereby is delegated the power to approve the use for intelligence purposes, within the United States or against the United States persons abroad of any technique for which a warrant would be required if undertaken for law enforcement*

purposes, provided that such technique shall not be undertaken unless the Attorney General has determined in each case that there is probable cause to believe that the technique is directed against a foreign power or an agent of a foregoing power. Electronic surveillance as defined in the Foreign Intelligence Surveillance Act of 1978 shall be conducted in accordance with that Act, as well as this Order." (Emphasis added)

Certainly an American Citizen abroad shall be entitled to the same protection if suspected of a crime (which carries with it a much less severe threat to the well-being of the public weal than does National Defense) than a violation of an Act involving the actual survival of the Nation or matters relating to International Terrorism. It would be axiomatic to say that if Congress requires probable cause to wiretap an American citizen engaged in potential acts of treason abroad there is no reason to assume that a lesser standard would be acceptable to Congress for an American citizen merely suspected of some Criminal Act. The protection of the laws in any event shall be equal. No rational hypothesis could possibly be suggested to require greater protection for an American citizen engaged in treasonable or terrorist activities than for a citizen merely suspected of a violation of some State or Federal law. A Defendant is entitled under the United States Constitution to the equal protection of its laws and a failure to provide the protections similar to those set forth in 50 U.S.C. § 401 would be a violation of that as well. Absent such rational basis a denial of equal protection occurs as it does in this case.

In the panel opinion the majority paid much emphasis to the concept of the reasonableness of the American agent's belief

in the propriety of the actions of the Foreign Police Agency under Foreign laws. The awareness of the requirement set forth under the Intelligence Act strikes at the very underpinning of that analysis. The agents were fully aware of the standards set in Section 2.5, and consequently any activities to circumvent same were per se unreasonable. This failure to act reasonably is more fully argued in the previously filed Petition for Rehearing and Memorandum of Points and Authorities.

WHEREFORE Defendants/Appellants, BENNETT and HARRIS pray this Court accept this Supplemental Authority raising additional matters for consideration before the Court en banc.

DATED:

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